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ADMINISTRATIVE OMBUDSMAN

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETIETH CONGRESS

SECOND SESSION

PURSUANT TO S. RES. 25

ON

S. 1195

TO ESTABLISH THE OFFICE OF ADMINISTRATIVE OMBUDSMAN TO INVESTIGATE ADMINISTRATIVE PRACTICES AND PROCEDURES OF SELECTED AGENCIES OF THE UNITED STATES

JANUARY 16, 1968

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ADMINISTRATIVE OMBUDSMAN

TUESDAY, JANUARY 16, 1968

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice at 10:10 a.m., in Room 3110, New Senate Office Building, Senator Edward V. Long of Missouri (chairman of the subcommittee), presiding.

Present: Senator Long of Missouri (presiding).

Also present: Bernard Fensterwald, Jr., chief counsel; Benny L. Kass, assistant counsel; William G. Ohlhausen, assistant counsel; Bernard J. Waters, Senator Dirksen's office, minority counsel.

Senator LONG. The committee will be in order.

This morning the Senate Subcommittee on Administrative Practices and Procedure resumes hearings on the subject of ombudsman. A little less than 2 years ago when our subcommittee first began studying this concept, it was necessary to explain what the word "ombudsman" means. Since our hearing with the Swedish ombudsman in March of 1966, there has been a lot of activity in this field. Today it is not necessary to explain the meaning of the word.

(S. 1195 follows:)

[S. 1195, 90th Cong., first sess.]

A BILL To establish the Office of Administrative Ombudsman to investigate administrative practices and procedures of selected agencies of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subchapter III of chapter 5 of title 5 of the United States Code is amended by renumbering section 576 as section 577, and inserting a new section 576 entitled "Administrative Ombudsman".

SEC. 2. As used in this Act, the term—

(a) "Ombudsman" means the Administrative Ombudsman duly appointed and serving under the provisions of this Act.

(b) "Office" means the Office of the Administrative Ombudsman established by this Act.

(c) "Agency" shall include the Social Security Administration, Veterans Administration, Internal Revenue Service, and the Bureau of Prisons, and any officer, employee, or member thereof acting or purporting to act in the exercise of his official duties.

(d) "Administrative act" includes any action, omission, decision, recommendation, practice, or procedure.

SEC. 3. (a) There is hereby created an establishment of the Government to be known as the Administrative Ombudsman, which shall be independent of the executive department and under the direction and control of the Administrative Conference. There shall be in the Office an Ombudsman and a Deputy Administrative Ombudsman who shall be appointed by the Ombudsman and shall perform such duties as may be assigned to him by the Ombudsman. During the absence or incapacity of the Ombudsman, or at any time at which there is no Ombudsman, the Deputy shall act as Ombudsman.

(b) The Ombudsman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of five years. In no case shall any person hold the office for more than four full terms. The Ombudsman shall receive compensation in an amount equal to that of the Chief Judge of the District of Columbia Court of Appeals. The annual rate of basic compensation of the Deputy Ombudsman shall be $22,500.

(c) The Ombudsman and the Deputy Ombudsman appointed under this Act shall be chosen, without regard to political affiliation, from individuals specially qualified to perform the duties of the office. Each individual so appointed shall be an individual who—

(1) has been admitted to the practice of law before the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is member of the bar of that court in good standing;

(2) is of good moral character, and possesses a good reputation for professional legal competence, personal integrity, diligence in the performance of duty, and freedom from personal bias or prejudice;

(3) has not, within the five-year period immediately preceding his appointment, served as a Member of Congress or as an appointed officer of any agency as defined in this Act;

(4) is a citizen of the United States.

(d) No person may serve as Ombudsman or Deputy Ombudsman while a candidate for or holder of any elected office, whether municipal, State, or Federal, or while engaged in any other business, vocation, or employment.

(e) The Congress of the United States, by two-thirds vote in each House, may remove the Ombudsman from office when, in the judgment of the Congress, he has become permanently incapacitated, or has been guilty of any felony, misconduct, or any other conduct involving moral turpitude, and for no other cause and no other manner except by impeachment.

(f) Subject to the civil service laws and the Classification Act of 1949, the Ombudsman may appoint and fix the compensation of such personnel as may be required for the performance of the duties of the office. The Ombudsman shall promulgate such rules and regulations as may be necessary to carry out the duties imposed upon him by this Act, and he may delegate authority for the performance of any such duty, except those specified in section 6 of this Act, to any officer or employee of the office. Such regulations shall include procedures for receiving and processing complaints, conducting investigations, and reporting his findings.

(g) The Ombudsman is authorized to charge a nominal fee for the investigation of complaints, and to waive any such fee when, in his opinion, a financial hardship may result to the complainant.

SEC. 4. (a) The Ombudsman shall have jurisdiction to investigate the administrative acts, practices, or procedures, of any agency as defined in section 2(c). Where necessary the Ombudsman may exercise his powers under this Act without regard to the finality of any administrative act.

(b) Upon his own motion or upon any oral or written complaint of any person, the Ombudsman shall conduct or cause to be conducted, in such manner as he shall determine to be appropriate, a full and complete investigation of any matter which is an appropriate subject for investigation under section 5 of this Act, unless, in his opinion—

(1) there is presently available an adequate remedy for the grievance stated in the complaint, whether or not complainant has availed himself of it;

(2) the complaint relates to a matter that is outside the jurisdiction of the Ombudsman;

(3) complainant does not have a sufficient personal interest in the subject matter of the complaint;

(4) complainant has had knowledge of the action complained of for too long a period before the complaint was submitted; or

(5) the complaint is trival, frivolous, vexatious, or not made in good faith.

(c) If, with respect to any complaint the Ombudsman decides not to investigate, he shall inform the complainant of that decision and his reasons therefor; except that he shall not be required to divulge matters which would invade the privacy of any individual, or interfere with legitimate governmental activities. In the event he decides to investigate, he shall notify the complainant and the agency concerned in writing of that fact. The Ombudsman shall not be prohibited

from making on-the-spot investigations of agency proceedings and activities, subject to proper notice to an appropriate official.

SEC. 5. (a) For purposes of this Act, an appropriate subject for investigation by the Ombudsman is an administrative act, practice, or procedure, of any agency which might be—

(1) contrary to law or regulation;
(2) unreasonable, unfair, or oppressive;
(3) based wholly or partly on a mistake of law or fact;
(4) based on improper or irrelevant grounds;
(5) unaccompanied by an adequate statement of reasons;
(6) performed in an inefficient manner; or
(7) otherwise erroneous.

(b) In carrying out his duties under this Act, the Ombudsman may investigate to find an appropriate remedy, or to make routine checks of the operations of any agency or agencies covered under this Act. The Ombudsman may undertake, participate in, or cooperate with general studies or inquiries, whether or not related to any particular administrative agency or any particular administrative act, if he believes that they may enhance knowledge about or lead to improvements in the functioning of administrative agencies.

(c) In any investigation under this Act, the Ombudsman may (1) make inquires and obtain any and all information from the agency or agencies as he deems necessary; (2) enter to inspect the premises of an agency; and (3) hold private hearings with both the complaining individual and agency officials.

(d) Subject to the privileges which witnesses have in the courts of the United States, the Ombudsman may (1) compel, at a specified time and place, by subpena, the appearance and sworn testimony of any person who the Ombudsman has reasonable cause to believe may be able to give information relating to a matter under investigation; and (2) compel any person to produce documents, papers, or objects which the Ombudsman has reasonable cause to believe may relate to a matter under investigation. The Ombudsman is authorized to bring an action in a district court in which the complainant resides, or has his principal place of business, or in which the agency is situated, in order to enforce the aforementioned powers.

SEC. 6. (a) Prior to rendering any opinion or making any recommendation that is critical of any agency or person, the Ombudsman shall consult with that agency or person. The Ombudsman shall allow that agency or person a reasonable period of time to take the necessary or appropriate action indicated, or to file a statement of explanation with the Ombudsman.

(b) If, after any investigation conducted by him under this Act, the Ombudsman finds that (1) a matter should be further considered by the agency; (2) an administrative act should be modified, amended, or canceled; (3) a statute or regulation on which an administrative act is based should be amended or repealed; (4) reasons should be given for an administrative act; or (5) any other action should be taken by the agency, he shall submit his views and recommendations to the agency. The Ombudsman may request the agency to notify him within a specified time, of any action taken by the agency on his recommendations. Any agency so requested shall be required to comply with such request.

(c) Within sixty days following the submission of his views and recommendations to any agency under subsection (b) of this section, the Ombudsman shall transmit copies thereof, together with copies of the agency's reply, to the head of the concerned agency, to the Chairman of the Administrative Conference of the United States and to the appropriate committees of the Senate and of the House of Representatives. The Ombudsman is further authorized to take such action as he may determine feasible to make such information available to the general public.

(d) The Ombudsman shall notify the complainant in writing of any action taken by him and by the agency with respect to his complaint.

SEC. 7. (a) If, in carrying out his duties under this Act, the Ombudsman determines that any employee or officer of any agency has been guilty of a breach of duty or misconduct in connection with his duties as an employee or officer of such agency, the Ombudsman shall refer the matter to the appropriate authorities in the Department of Justice.

(b) The Ombudsman shall, on or before March 1 of each calendar year, submit to the President, to the Congress, and to the head of the Administrative Conference a written report concerning his activities under this Act during the preceding calendar year.

SEC. 8. (a) No proceeding, decision, or report of the Ombudsman conducted or made in accordance with the provisions of this Act shall be challenged, reviewed, quashed, or called into question in any court. No action, civil or criminal, shall lie against the Ombudsman or against any person holding any office or appointment under the Ombudsman, for anything the Ombudsman or such persons may do, report, say in the course of the exercise or intended exercise of their functions under this Act, unless it is shown that they acted in bad faith. The Ombudsman shall not be called to give evidence in any court, or in any proceeding of a judicial investigation of his functions.

(b) Any letter addressed to the Ombudsman and written by any person in custody on a charge of, or after conviction of, any offense under the laws of the United States, or by any inmate of any institution under the control of the Bureau of Prisons, shall be immediately forwarded, unopened, to the Ombudsman by the institution where the writer of the letter is detained or which he is an inmate.

(c) The provisions of this Act shall be in addition to the provisions of any other law or regulation under which any remedy or right of appeal is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter, and nothing in this Act shall limit or affect any such remedy, right of appeal, or procedure. The powers conferred on the Ombudsman by this Act may be exercised by him notwithstanding any other provision of law to the effect that any administrative action or omission shall be final or that no appeal shall lie in respect thereof.

SEC. 9. Any person who willfully obstructs or hinders the Ombudsman in the proper exercise of his powers under this Act, refuses or willfully fails to comply with any lawful requirement of the Ombudsman under this Act, or willfully makes any false statement or misleads or attempts to mislead the Ombudsman in the exercise of his powers under this Act, shall be fined not more than $1,000.

SEC. 10. There are hereby authorized to be appropriated such sums as may be necessary, not in excess of $100,000, to carry out the provisions of this Act.

As I remarked at our first hearing on this subject, any new idea is met with immediate opposition. Opposition to ombudsman today comes from many places: from elected officials, agency representatives, and occasionally from the press. But in general, it seems safe to say that the majority of Americans want and need some institution to help them fight their city hall; they want some place to complain about the operations of their government.

Recently, the subcommittee issued a committee print listing the ombudsman activities in 1967. Hawaii has become the first State in the Union to formally create the office. We were encouraged to find that bills to create a State ombudsman were introduced in some 27 State legislatures; several cities are also considering the creation of an ombudsman and, of course, several of my colleagues and I in the Senate have introduced bills to create various forms of Federal ombudsmen.

There is today a need for some grievance procedure whereby the complaining citizen can get his day in court. This function, in large part is handled at the Federal level by the elected representatives in Congress. There is still room for additional procedures. For this reason, we look forward to watching the recently activated Administrative Conference of the United States, which has the authority to take complaints from the public at large. We are pleased to welcome the newly appointed Chairman of the Administrative Conference, Prof. Jerre Williams, who will explore this subject with us this morning.

There are, of course, other areas of the Federal Government which need ombudsman-like review, including the Selective Service System, and farming and agriculture. As this Congress progresses, we will try to study these problems also. It is, of course, at the State and local level where the ombudsman can be most useful. We are encouraged by

the letters and comments of State and local governments throughout the Nation who have expressed interest in our hearings, and are themselves considering ombudsman proposals. To assist these local governments in their consideration of grievance procedures, we will also hear this morning from Mr. Randy Hamilton, director of the Institute for Local Self-Government. It is my understanding that Mr. Hamilton's organization has made the only existing study of local grievance procedures, and we will hear from Mr. Hamilton later in the day.

Before we turn to Professor Williams, I want to read a statement which Ambassador Arthur Goldberg made while he was an Associate Justice of the Supreme Court.

> In Scandinavia, that excellent institution called the Ombudsman assists the ordinary citizen in seeing that the law is not administered with an evil eye or an uneven hand. He also assists the public official by clearing the air of unfound charges. In both ways, the Ombudsman helps safeguard the integrity of equal protection. The Ombudsman—or rather the idea it embodies—appropriately adapted to our governmental institutions, towns, cities, states, and even the Nation could help in the realization of our ideal of equal treatment of all citizens by government officials.

Our first witness this morning is Prof. Jerre S. Williams, Chairman of the Administrative Conference of the United States. Mr. Williams, will you come around? We are certainly delighted to have you here. We, of course, have been very anxious for this position to be filled since this bill was considered, and passed on by this committee and Congress, and we are delighted to welcome you here in your new position and in your first appearance before the committee that considered the legislation.

Will you introduce your two colleagues to the committee and then I believe you have a prepared statement which we will be glad to hear at this time.

STATEMENT OF JERRE S. WILLIAMS, CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE; ACCOMPANIED BY JOHN F. CUSHMAN, EXECUTIVE DIRECTOR OF THE CONFERENCE, AND WEBSTER P. MAXSON, EXECUTIVE SECRETARY OF THE CONFERENCE

Mr. JERRE WILLIAMS. Thank you, Mr. Chairman.

I do appreciate your welcome. I am delighted to be here.

I have a prepared statement. It is quite short, and I believe I would rather stick fairly close to it except as you would like to have me digress with whatever questions you may have.

Senator LONG. If you would prefer to finish your entire statement before——

Mr. JERRE WILLIAMS. No; if you would like to ask questions that would be fine.

Senator LONG. You may proceed with your statement.

Mr. JERRE WILLIAMS. Mr. Chairman, my name is Jerre S. Williams, and I am Chairman of the Administrative Conference of the United States. I am accompanied today by the Executive Director of the Conference, Mr. John F. Cushman, on my right, and the Executive Secretary of the Conference, Mr. Webster P. Maxson, on my left.

It is a particular pleasure and honor to be invited to make my first official appearance before the subcommittee which played such a lead-

ing role in the establishment of the agency I am privileged to head. I regard the Administrative Conference Act as landmark legislation. I assure you we will devote our best efforts to carry out its important policies and programs.

At the outset I must make it clear that I am not today a spokesman for the Administrative Conference. The conference is just in the very early stages of being organized. Its membership has not been fully selected, and it has not yet met. It follows that today I testify only in my individual capacity as Chairman of the Conference. Moreover, I feel it wise to adopt the suggestion in your letter of invitation; my remarks are limited to exploring the concept of ombudsman and the Administrative Conference as they relate to the handling of citizens' grievances, without taking a specific position on the bill you have before you.

It is obvious, but yet so inescapably true it should be stated here again, that every effort must be made to establish the dealings of our citizens with their government on a fair, thorough, and expeditious basis. I am sure the vast bulk of those in government service who deal directly with our citizens are as thoroughly convinced of this as are the citizens themselves. Our system of government works in large measure because it is composed of dedicated public servants of integrity who do a magnificent job. At the same time there is and there always will be room for improvement in the practices and procedures of the administrative processes of our government.

The current moves toward experimentation with the ombudsman concept surely are desirable. One of the outstanding advantages of the Federal System is that it enables experimentation with various agencies for the improvement of government at State and local levels. Thus, I am pleased to see the number of proposals for the use of ombudsmen at these levels of government, for they should prove useful in our own examination of the subject.

On the Federal scene, the consideration of the creation of an ombudsman as set out in the chairman's proposed bill is a worthwhile and useful inquiry. The application of the ombudsman concept to the Federal Government does raise some significant considerations, however, which should be mentioned.

The first and most obvious of these is the size of the Federal Government structure and the scope of its multitude of administrative processes. There is some evidence, as this committee knows from its extensive study of particular cases, that the ombudsman technique may work most effectively in smaller and simpler governmental structures. There is, therefore, the very real possibility that a single ombudsman for all Federal regulatory processes would require such a large organization that it might become a super agency which could be more of an obstruction to the administrative processes than a means of expediting them. I am, of course, fully aware that the chairman's bill is much more limited in scope, and if an ombudsman is to be developed in the Federal structure, a limited scope for his activities is desirable, at least initially.

Closely related to what I have just said is that if we do adopt this approach we must be mindful of the danger that concentration upon individual complaints may bog down the governmental processes to the extent that far-reaching and important improvements to the

benefit of all citizens become more difficult to accomplish. Certainly we do not want to create what amounts to new administrative processes which would expend undue time and effort to redo administrative action which has been taken already in the regular administrative structure.

Another preliminary observation I would make concerning the ombudsman facility as it applies to the Federal scene is that we already have a number of effective governmental processes filling a similar function. I need not stress to this committee the tremendously useful and dedicated work along these lines which is carried out by the Members of Congress and their staffs. The heads of the executive departments and the independent regulatory agencies also have fine records in resolving their own administrative difficulties. Our system of judicial review of administrative determinations provides a remedy against arbitrary or capricious action or actions contrary to law. It should be emphasized that in those countries in which the ombudsman facility has wide use we do not find as highly developed systems of judicial review of administrative action as we do in this country. And then, of course, the Office of the President has traditionally received citizens' complaints and has been a strong influence in resolving many of them or explaining to an aggrieved citizen the rationale for governmental action taken.

With these general observations, I should now like to turn my attention to the role of the Administrative Conference as it relates to the ombudsman concept. It should be obvious to the members of this committee that I am enthusiastic about the prospects for the new permanent Administrative Conference. It will be a means for the constant and continuing improvement of Federal regulatory practices and procedures. I should like to emphasize, that the Administrative Conference is not and will not become a super agency. The Congress has wisely constituted it in such a way that the governmental departments and regulatory agencies will play a dominant role in improving their own procedures. The Administrative Conference is established at the same level as the regulatory agencies for the purpose of creating a mechanism and an environment whereby they can themselves work together in a structured organization to bring about improvements in practices and procedures. In addition, the conference enables the injecting into this process of self-improvement, some of the finest and most skilled minds from outside the Government as a leavening agent. The previous temporary Administrative Conferences, under the most able leadership of Judge Prettyman, showed that the departments and agencies through the use of this kind of organization are willing and eager to participate. The fact that there should be a Conference organized on a permanent basis was one of the principal recommendations of the last temporary Conference, and the widespread support this recommendation received from all quarters augurs well for the future of the Conference.

More particularly as it relates to the ombudsman concept, the Administrative Conference may well develop into an effective agency for fulfilling some of the more important objectives envisioned in the ombudsman's role. The major statutory charge for the conference is the improvement of administrative practices and procedures which

serve the public. The first power given to the Chairman by the statute is to "make inquiries into matters he deems important for Conference consideration, including matters proposed by persons inside or outside the Federal Government."

I regard this statutory directive as a specific authorization for the Chairman and the Conference to investigate particular regulatory processes and procedures whenever there is indication from any source that such particular processes and procedures are trouble spots. This indication may arise from a series of citizens' complaints, but could, of course, be manifested in a single complaint.

I do stress, however, that I do not envisage the Administrative Conference or the Office of the Chairman handling individual complaints on a substantive basis—that is, to determine the correctness or incorrectness of a particular action on the merits. But I do see the use of citizens' complaints as a means of pinpointing troublesome areas that the Conference might wish to investigate.

Senator LONG. May I interrupt you right there?

Mr. JERRE WILLIAMS. Yes.

Senator LONG. That would be in this area where the ombudsman concept might be of some assistance in handling individual complaints.

Mr. JERRE WILLIAMS. That is correct. The statutory charge of the Administrative Conference is limited to procedures only, and is not, therefore, concerned with the substance of any particular complain.

Senator LONG. You mentioned a moment ago one of the problems we have considered—and that is the size of the Federal Government. But Mr. Fensterwald just pointed out to me that Great Britain, with a population of approximately 50 million, has just installed an ombudsman system in their government.

Mr. JERRE WILLIAMS. Yes, they have.

Senator LONG. So we will watch that with interest to see how they get along.

Mr. JERRE WILLIAMS. It is really exciting for us to know that Great Britain has installed such a system and to watch how it operates there.

For the Administrative Conference, I do see the use of citizens' complaints as a means of pinpointing trouble in some areas that the Conference might wish to investigate. From the Conference may then come remedial procedural recommendations for improvements which will redound to the advantage not just to the complainant but to all citizens involved in those regulatory programs.

I might add that this concept of the function of the Administrative Conference as it relates to individual citizen complaints seems to be in line with that of Prof. Walter Gellhorn of Columbia, who is undoubtedly, as I am sure you know, one of the leading experts in the United States on ombudsmen and similar devices for resolving citizen's complaints against governmental action. In his book, "When Americans Complain," he sets forth a role of the Administrative Conference similar to what I have just outlined and I quote:

> **The Administrative Conference of the United States is particularly well suited, in structure and in concept, to analyze methodological problems and prescribe their solution; if the Conference functions as it should, complaints should become less voluminous.**

As soon as the Administrative Conference is sufficiently organized to begin its work, a first order of business, of course, will be the selection of potentially fruitful subjects for conference study. Careful consideration in this selection process will be given to the possibility of evaluating the application of the ombudsman idea in our Federal establishment and the potential utility of the various forms in which the mechanism might be tried in this country. Such questions would seem to me to be among the appropriate initial undertakings of the Conference, and I plan to suggest this topic to the Conference for its early consideration.

Finally, as I complete my statement, I would like to say, I look forward to close cooperation with the Congress, this subcommittee, and the Federal departments and agencies. Our common goal is to improve administrative practices and procedures. The most direct and effective way is for the agencies themselves continually to review their practices and to initiate and adopt improvements themselves.

But the philosophy underlying the concept of the ombudsman or any other technique for meaningful handling of citizens' complaints is sound. The specific question is how that philosophy can be adopted to our huge Government structure in a way which will do the most good for the most citizens. Our obvious aim should be to cure the problems in regulatory processes without becoming fettered by detail. In short, our common direction should be to devise procedures which will lessen the need for an ombudsman to handle a multitude of specific complaints from aggrieved citizens.

I am confident the Administrative Conference can play a significant role in working toward the achievement of this aim. We welcome the aid, advice, and guidance of this subcommittee and of the Congress as we organize and begin our assigned tasks.

That completes my prepared statement, Mr. Chairman.

Senator LONG. Thank you, Mr. Chairman. It is a very fine statement. Without objections, we will place in the record at this point the biographical sketches of Mr. Williams, Mr. Cushman, and Mr. Maxson.

(The information follows:)

BIOGRAPHICAL SKETCH OF JERRE S. WILLIAMS

Jerre S. Williams was born in Denver, Colo., August 21, 1916, the son of the late Wayne C. Williams and Lena Day Williams. He was reared in Denver where his father was a practicing attorney and at one time was Attorney General of Colorado and also Special Assistant to the Attorney General of the United States.

Mr. Williams graduated from the University of Denver in 1938 with an A.B. degree in political science; graduated from Columbia Law School with an LL.B. degree in 1941. While at Columbia Law School he was an editor of the Columbia Law Review and a Kent Scholar. He was admitted to the Colorado Bar in 1941, the Texas Bar in 1950, and the Bar of the United States Supreme Court in 1945.

In 1941, Mr. Williams began his law teaching career at the University of Iowa Law School. In the summer of 1942, he served as an attorney in the Office of Price Administration while awaiting his call of active duty in the Air Force. In the fall of 1942, he entered the Air Force and served as a Legal Officer in the Air Transport Command until his release from active duty in 1946.

In the spring and summer of 1946, Mr. Williams served as Assistant Professor of Law at the University of Denver Law School while awaiting his joining of the faculty at the University of Texas Law School in the fall of 1946. He served successively as an Associate Professor of Law and Professor of Law at the University of Texas until appointment as Chairman of the Administrative Conference of the United States in October of 1967. In 1964, he was named the Rex G. Baker and Edna Heflin Baker Professor of Constitutional Law at the

University of Texas. In 1958, he was the first Professor in the Law School to be awarded the Teaching Excellence Award upon designation of the students. He was given this award again in 1964. Mr. Williams has also taught summer terms at the University of Chicago Law School, the University of California at Los Angeles Law School, and the University of North Carolina Law School. In 1955 and 1956, Mr. Williams took leave from the University of Texas to serve as Associate Staff Director of the Special Committee on Loyalty-Security of the Association of the Bar of the City of New York. In the summer of 1960, he made a study of comparative free speech problems in London, England under a grant of Ford Foundation funds from the University of Texas Law School. In 1964–1966, he served as Chairman of the Southwest Regional Manpower Advisory Committee under the joint appointment of the Secretary of Health, Education and Welfare and the Secretary of Labor.

Mr. Williams is the author of several books, including The Supreme Court Speaks, 1956, Cases and Materials on Employee's Rights, 1952, Second Edition, 1958, and he is the Editor-in-Chief of the Third Edition of Labor Relations and the Law, 1965. In 1963, he won the Ross essay prize of the American Bar Association. He delivered a paper at the Fifth International Congress of Labor Law and Social Legislation in Lyon, France in 1963, and in 1966, he delivered a paper at the Sixth International Congress of Labor Law and Social Legislation in Stockholm, Sweden. He is also the author of numerous articles in legal publications.

An active labor arbitrator for many years, Mr. Williams is a member of the National Academy of Arbitrators, having served on its Board of Governors.

Mr. Williams was married in Austin, Texas in 1950 to the former Mary Pearl Hall who also is an attorney. They have three children: Jerre Stockton Jr., Shelley Hall, and Stephanie Kethley.

Mr. Williams is a Democrat, and a member of the University Methodist Church in Austin, Texas, where he has served on the Official Board, as Chairman of the Pastoral Relations Committee, and as Chairman of the Commission on Christian Social Concerns.

Mr. Williams has two brothers. Dr. Daniel Day Williams is Professor of Systematic Theology at the Union Theological Seminary, New York City, and Mr. Wayne D. Williams is a practicing lawyer in Denver, Colo. Another brother, Roger W. Williams is deceased.

BIOGRAPHICAL SKETCH OF JOHN F. CUSHMAN

Born November 29, 1922 the son of Professor (Emeritus) and Mrs. Robert E. Cushman of Cornell University, Mr. Cushman attended public schools at Ithaca, New York, and the Westtown (Pa.) Friends Preparatory School. He received his A.B. degree with honors from Cornell University in 1944, served in the Field Artillery until the end of W.W. II, being discharged as a First Lieutenant, and obtained his law degree from the Cornell Law School in 1949, where he was a member of the Law Journal.

From 1949 to 1951 he was law clerk, first to Judge Henry W. Edgerton of the Circuit Court of Appeals for the District of Columbia Circuit and, later, to Mr. Justice Robert H. Jackson of the Supreme Court of the United States.

Mr. Cushman joined the Department of Justice in 1951 as a trial attorney in the Office of Alien Property. From 1953 to 1957 he was a general attorney in the Department's Office of Legal Counsel. After serving as Associate General Counsel of the Interstate Commerce Commission (1957–1958), he returned to the Department of Justice as Director of the Office of Administrative Procedure (1958–1959), and served as Executive Assistant to the Attorney General (1959–1961).

In May 1961 he became the Assistant General Counsel for Administrative Law and Treaties, Federal Communications Commission, and in September 1962 was appointed Administrative Assistant to Chairman Newton N. Minow, a position he continued to hold under Chairmen E. William Henry and Rosel H. Hyde. He joined the staff of the Administrative Conference of the United States in January 1968 as Executive Director under Chairman Jerre S. Williams.

Mr. Cushman is a member of the Annandale Methodist Church, Phi Beta Kappa, Phi Kappa Phi, the Order of the Coif, and is admitted to practice before the Bar of the State of New York and the Supreme Court of the United States.

He married Jane N. Casterline of Ithaca, New York, March 6, 1945: children, Mrs. Fred N. Nadeau of Portland, Oregon, John, Jr. and Robert H.; their residence is 4312 Braeburn Drive, Fairfax, Virginia.

BIOGRAPHIC SUMMARY, WEBSTER P. MAXSON

Career public servant now in his 23rd year of Federal service. Born September 24, 1916, the second of four sons of Harold S. and Bertha (Kapple) Maxson, his voting residence is in Massachusetts. Mr. Maxson is a graduate of Amherst College (1939) and the College of Law, University of Cincinnati (1949), and studied accounting at George Washington University (1951). He served for five years in Army Air Forces.

Mr. Maxson's early government experience was as a trial attorney handling litigation in the Federal courts throughout the country on behalf of the Government, and as bureau counsel in a great many administrative proceedings before the Department of Agriculture and the Federal Communications Commission. As a member of the staff of the Office of Legal Counsel in the Department of Justice, he did considerable work in connection with proposed legislation involving a variety of subjects.

In 1959, Mr. Maxson was appointed Director of the Office of Administrative Procedure in the Justice Department. He also has served as Staff Director of the President's Panel on Ethics in Government, in 1961, and was Executive Secretary of the temporary Administrative Conference of the United States which operated in 1961 and 1962.

His present position is Director, Office of Administrative Procedure, Department of Justice. He is acting as Executive Secretary of the permanent Administrative Conference of the United States established pursuant to 5 U.S.C. 571–576.

As I said a moment ago, we are delighted that you are serving as chairman and that this Administrative Conference will now proceed to perform the duties that we think it will. We hope that it works out well. It might even put the ombudsman out of business—making it an unnecessary institution.

Mr. JERRE WILLIAMS. It would be a wonderful thing if it could, and we will try.

Senator LONG. But as you indicated in your statement, if an ombudsman is to be established, it would require the close cooperation with you and the Office of the Administrative Conference. I am sure that your working together would be very gratifying.

Mr. JERRE WILLIAMS. Yes.

Senator LONG. Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. No.

Senator LONG. Mr. Kass?

Mr. KASS. Thank you, Mr. Chairman.

Senator LONG. Benny Kass has been doing a lot of work on this subject.

Mr. KASS. Professor Williams, there has been a lot of concern about the question of size, as to whether one ombudsman can handle all of the problems and complaints that come in at the Federal level. Professor Gellhorn, as you mentioned, in his book made the comment that there is no magic to the number one—perhaps we could set up four or five or six ombudsmen. In this connection, would a form of regional ombudsmen with jurisdiction, for example, over all of the Federal activities in a particular State or two States seem to work as an experiment in your mind?

Mr. JERRE WILLIAMS. Mr. Kass, I would, certainly, anticipate some jurisdictional problems in matters that go between States, and I am sure you have anticipated them, too. But in general, this kind of approach of experimenting with the ombudsman concept in a region or at a lower governmental level or in a more selected area, as the chairman's bill does, it seems to me, is the way to work effectively toward the proving out of this concept.

Mr. KASS. As an experiment?

Mr. JERRE WILLIAMS. As an experiment, that is right.

Mr. KASS. When Senator Long introduced S. 1195, he made the statement that we have selected the four agencies, Bureau of Prisons, VA, and the others because, and I quote the Senator, "the great bulk of citizens' complaints arise in connection with the above-mentioned agencies."

When the Department of the Treasury responded to the bill in their letter, they made the comment that if any agency at the national level is to be made the subject of an innovative experiment, the agency selected should be such as serves or deals with a relatively small number of persons and administers a law that is not overly complex or frequently changed, referring obviously to the Internal Revenue procedure. Do you have any comments on this suggestion?

Mr. JERRE WILLIAMS. Yes, Mr. Kass. It seems to me that you can get the restricted scope in any one of several directions. One of them is to limit it to certain agencies, and not try to cover the entire Federal Government. Another one would be to limit it to agencies where there would not be many complaints. It could be done either way.

It certainly seems to me that there can be substantial justification for considering the innovative experiment in an area, such as these four agencies, that most commonly involves what we might call relatively small citizen complaints. They are not the complaints of large industries or anything like that, but they are the individual dealing with his government, and this is a way to restrict it and try it out.

Of course, I don't think we can anticipate just how many complaints will come in on that basis, but it is an innovative experiment and we could see. But you could restrict it either way.

Mr. KASS. Of course, the Swedish expert who testified that the petty complaints of the citizens bother them more than anything else.

Mr. JERRE WILLIAMS. They are the complaints of the citizens, and the danger is we may sit back and take a look and say, "we can't be bothered with those things."

Mr. KASS. And we may find that 80 to 90 percent of the complaints in the United States are unfounded as the Swedish ombudsman and many other ombudsmen have found.

Mr. JERRE WILLIAMS. We don't know. I would emphasize again at this point the value of ombudsmen experiments at the State and local level such as we are getting around the country, for this very purpose.

Mr. KASS. Now, in our S. 1195, section 3 of the bill puts the administrative ombudsman under the control and direction of yourself as Chairman of the Administrative Conference. Is this a workable procedure, do you think?

Mr. JERRE WILLIAMS. I think there are some difficult problems here. Certainly it doesn't follow the patterns which we have seen elsewhere in the world—to have an ombudsman in one sense under the supervision of somebody else.

Now, I recall that Kenneth Culp Davis, in his analysis of the ombudsman concept, indicated he thought there could be a bifurcated Administrative Conference, one side of it being the Conference concept, and the other side being the ombudsman concept. This it seems to me, is simply a detail. The function is the important thing. I would say in summary that I have some reservations about the precise way

that the relationship is set up here because I think it is somewhat vague and indefinite. I am not sure just how it would work out.

Mr. KASS. But in theory, even without the legislation, you could set up a form of ombudsman office under the Administrative Conference.

Mr. JERRE WILLIAMS. I certainly think this is so, and it might well be that the Chairman of the Conference would have to be viewed as something of an ombudsman, and then this creates problems because he is also the Chairman of the Conference, and it is a bifurcated set up.

Mr. KASS. Although the legislation clearly allows you to take complaints from outside the Government.

Mr. JERRE WILLIAMS. This is certainly true, that is right, but on the procedural basis.

Mr. KASS. Mr. Chairman, I have no further questions.

Senator LONG. Mr. Waters?

Mr. WATERS. Professor, it is a pleasure to welcome you to your new endeavor, and I wish you every success in it.

Mr. JERRE WILLIAMS. Thank you.

Mr. WATERS. I have no questions for you at this time except to wish you well, and I assume that you will be appearing before similar committees and subcommittees with equal profit in time to come. I look forward to the opportunity of discussing with you your new work in due course.

Thank you very much.

Mr. JERRE WILLIAMS. Thank you very much, Mr. Waters. I look forward to further appearance before this and other similar committees.

Senator LONG. Thank you, Mr. Chairman. We are grateful to you for appearing this morning. At this point in the record shall be printed a copy of Public Law 88–499 which created the permanent Administrative Conference.

(The information follows:)

[Public Law 88–499, 88th Cong., S. 1664, Aug. 30, 1964]

AN ACT To provide for continuous improvement of the administrative procedure of Federal agencies by creating an Administrative Conference of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Conference Act".

FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress finds and declares that—

(a) administration of regulatory and other statutes enacted by Congress in the public interest substantially affects large numbers of private individuals and many areas of business and economic activity;

(b) the protection of public and private interests requires continuing attention to the administrative procedure of Federal agencies to insure maximum efficiency and fairness in achieving statutory objectives;

(c) responsibility for assuring fair and efficient administratve procedure is inherent in the general responsibilities of officials appointed to administer Federal statutes;

(d) experience has demonstrated that cooperative effort among Federal officials, assisted by private citizens and others whose interest, competence, and objectivity enable them to make a unique contribution, can find solutions to complex problems and achieve substantial progress in improving the effectiveness of administrative procedure; and

(e) it is the purpose of this Act to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively

study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Administrative program" includes any Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing or investigation, as those terms are used in the Administrative Procedure Act (5 U.S.C. 1001–1011), except that it does not include any military, naval, or foreign affairs function of the United States.

(b) "Administrative agency" means any authority as defined by section 2(a) of the Administrative Procedure Act (5 U.S.C. 1001(a)).

(c) "Administrative procedure" means procedure used in carrying out an administrative program and shall be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but shall not be construed to include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SEC. 4. (a) There is hereby established the Administrative Conference of the United States (hereinafter referred to as the "Conference"), which shall consist of not more than ninety-one nor fewer than seventy-five members appointed as set forth in subsection (b) of this section.

(b) The Conference shall be composed of—

(1) a full-time Chairman, who shall be appointed for a five-year term by the President by and with the advice and consent of the Senate. The Chairman shall receive compensation at the highest rate established by law for the chairman of an independent regulatory board or commission, and may continue to serve until his successor has been appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or a person designated by such board or commission;

(3) the head of each executive department or other administrative agency which is designated by the President, or a person designated by such head of a department or agency;

(4) when authorized by the Council, one or more appointees from any such board, commission, department, or agency, designated by the department or agency head or, in the case of a board or commission, by the head of such board or commission with the approval of the board or commission;

(5) persons appointed by the President to membership upon the Council hereinafter established who are not otherwise members of the Conference; and

(6) no more than thirty-six other members appointed by the Chairman, with the approval of the Council, for terms of two years: *Provided*, That the number of members appointed by the Chairman shall at no time be less than one-third nor more than two-fifths of the total number of members. Such members shall be selected in a manner which will provide broad representation of the views of private citizens and utilize diverse experience, and shall be members of the practicing bar, scholars in the field of administrative law or government, or others especially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference other than the Chairman shall receive no compensation for service but members appointed from outside the Federal Government shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 73b–2) for persons serving without compensation.

DUTIES AND POWERS OF THE CONFERENCE

SEC. 5. To carry out the purposes of this Act the Conference is authorized to—

(a) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative

programs, and make recommendations to administative agencies, collectively or individually, and to the President, the Congress, or the Judicial Conference of the United States, in connection therewith, as it deems appropriate;

(b) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(c) collect information and statistics from administrative agencies and publish such reports as it deems useful for evaluating and improving administrative procedure.

ORGANIZATION OF THE CONFERENCE

SEC. 6. (a) The membership of the Conference meeting in plenary session shall constitute the Assembly of the Conference. The Assembly shall have ultimate authority over all activities of the Conference. Specifically, it shall have power to (1) adopt such recommendations as it deems appropriate for improving administrative procedure: *Provided*, That any member or members who disagree with a recommendation adopted by the Assembly shall be accorded the privilege of entering dissenting opinions and alternative proposals in the record of Conference proceedings, and the opinions and proposals so entered shall accompany the Conference recommendation in any publication or distribution thereof; and (2) adopt bylaws and regulations not inconsistent with this Act for carrying out the functions of the Conference, including the creation of such committees as it deems necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference shall include a Council composed of the Chairman of the Conference, who shall be the Chairman of the Council, and ten other members appointed by the President, of whom not more than one-half shall be officials or personnel of Federal regulatory agencies or executive departments. Members other than the Chairman shall be appointed for three-year terms, except that the Council members intially appointed shall serve for one, two, or three years, as designated by the President: *Provided*, That (1) the service of any member shall terminate whenever a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment, and (2) except as provided in item (1), above, any member whose term has expired may continue to serve until a successor is appointed. The Council shall have power to (1) determine the time and place of plenary sessions of the Conference and the agenda for such meetings and it shall call at least one plenary session each year; (2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly; (3) make recommendations to the Conference or its committees upon any subject germane to the purposes of the Conference; (4) receive and consider reports and recommendations of committees of the Conference and tansmit them to members of the Conference with the views and recommendations of the Council; (5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman; (6) designate such additional officers of the Conference as it may deem desirable; (7) approve or revise the Chairman's budgetary proposals; and (8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman shall be the chief executive of the Conference. In that capacity he shall have power to (1) make inquiries into matters he deems important for Conference consideration, including matters proposed by persons inside or outside the Federal Government; (2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to effectuate the recommendations of the Conference; (3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law; (4) recommend to the Council appropriate subjects for action by the Conference; (5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference; (6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference; (7) appoint employees, subject to the civil service and classification laws define their duties and responsibilities, and direct and supervise their activities; (8) rent office space in the District of Columbia; (9) provide necessary services for the Assembly, the Council, and the committees of the Conference; (10) organize and direct studies ordered by the Assembly or the Council, utilizing from time to time, as appropriate,

experts and consultants who may be employed as authorized by section 15 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. 55a), but at rates for individuals not to exceed $100 per diem; (11) upon request of the head of any agency, furnish assistance and advice on matters of administrative procedure; and (12) exercise such additional authority as may be delegated to him by the Council or the Assembly. The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman shall, on behalf of the Conference, transmit to the President and the Congress an annual report and such interim reports as he deems desirable.

(d) The President may designate a member of the Council as Vice Chairman, who shall serve as Chairman in the event of a vacancy in that office or in the absence or incapacity of the Chairman.

APPROPRIATIONS

SEC. 7. There are hereby authorized to be appropriated such sums as may be necessary, not to exceed $250,000, to accomplish the purposes of this Act.

Approved August 30, 1964.

Senator LONG. The next witness this morning is Mr. Randy H. Hamilton, the executive director of the Institute for Local Self-Government, Berkeley, Calif. Mr. Hamilton.

Mr. HAMILTON. Thank you.

Senator LONG. Mr. Hamilton, I understand that you have a prepared statement and the committee would be happy to hear it at this time. We appreciate your coming clear across the country to be here to testify before our committee this morning.

STATEMENT OF RANDY H. HAMILTON, EXECUTIVE DIRECTOR, INSTITUTE FOR LOCAL SELF-GOVERNMENT, BERKELEY, CALIF.

Mr. HAMILTON. Thank you, Mr. Chairman, and with your indulgence, I will concentrate my efforts largely on my prepared statement. I would suggest as a matter of procedure that if you find a question arising from my statement, I would be pleased to have you interrupt at any time at your convenience.

Senator LONG. It will be necessary for me to listen to your statement very closely. I see you have used very small type.

Mr. HAMILTON. May I also say at the outset, Mr. Chairman, as a representative of a great State which has produced in our history a good many famous woodsmen that you would have less difficulty with the term if you would call it omudsman—rhymes with "woodsman"—instead of other pronunciations. I have the same difficulty with "smorgasbord."

I am Randy H. Hamilton, executive director of the Institute for Local Self-Government, Berkeley, Calif. I make this presentation to the committee in response to its invitation of January 4, which I assume to have been occasioned by the research efforts of the institute for the past 2½ years under a grant from the Stern Family Fund to study and inventory methods for the redress of citizen grievances.

The outstanding feature of public administration in this century, at all levels of government has been the extension of governmental responsibility for the provision of new services and engagement in new functions. This has, of course, added new and larger dimensions of administration which directly affects the lives and property of the individual in a manner and on a scale not previously prevalent. An

increasing number of discretionary decisions affecting the rights and interests of citizens are being made—or are not being made—by governmental agencies and employees. Government's policies and the implementation of them through the bureaucracy affect the lives of people not envisaged in a way when the structure and the administrative processes of Federal, State, and local governments were being developed in the United States.

In Jefferson's words the unending conflict between liberty and authority has intensified. The area of rights without remedies is broadening. These things being so, procedures for the redress of citizen grievances become of looming and extraordinary importance. This committee is to be commended for its recognition of and consideration of proposals for improving these conditions.

The discretionary decisions now being made in agencies almost without number have created sore spots because multitudes of people feel aggrieved by government action or inaction. As government has grown bigger and become more omnipresent, the total of such citizens has increased geometrically and multidimensionally. This makes for bitterness and unrest which, in turn, create difficult administrative situations for administrators and an atmosphere that adds to the already monumental difficulties of establishing effective improvement and new service programs. The problem is not one of civil rights. Properly understood, it is basically that most administrations are not sufficiently aware of, much less structured and organized, to provide simple, orderly, inexpensive, widely known, accessible processes for the redress of citizen grievances in keeping with justice and equity where administrative agencies execute a milaton of regulations.

The results of our research indicate a potentially serious weakness in our governmental processes caused by a general absence of such procedures for objecting to decisions or nondecisions. Research reveals a singular lack of attention, literature or comprehensive study, for example, of the quasi-judicial roles of legislators and legislatures. It is said that everybody knows you can appeal to the city council or the State legislature or to your Congressman but there are no general patterns in fulfillment of these roles with which citizens can become generally familiar. Legislatures and legislators serving in a quasi-judicial capacity may make it seemingly easy for a citizen to approach the policymakers with reference to his complaint against administration but there should be a recognition that this blurring tends to eliminate the usual checks, balances, and separation of powers characteristic of American Government. A third party critic in such situations might be helpful.

It was found, for example, early in our project that top level executive officers rarely keep files on complaints and grievances. In our research we were frequently told, "if the departments and agencies under my supervision were not doing a good job vis-a-vis the citizen, I'd be the first to know." Our opinion, however, is that like the traditional cuckolded husband, he is frequently the last to know. The failure to keep adequate records of complaints and grievances make it impossible to discern patterns of dissatisfaction with administrative behavior and decisions. Files are virtually nonexistent. It is our conclusion the bureaucracies do not generally use complaints and grievances known to them as a tool for testing performance and making reforms.

Technical competence in government is no longer enough, if, indeed, it ever was. Social awareness and leadership are most necessary. The development of better grievance mechanisms and the hairline tuning of government to societal disenchantments is at the core of many of our problems. Institutional reforms are part of the task of modern governmental administration. Legislatures, in their policy setting roles, have the responsibility to initiate such reforms. The lack of administrative innovations to adapt government bureaucracies to the urban changes of this century is a major obstacle in solving today's urban problems. Administrative structures must be devised to permit flexibility in meeting public needs, and policies must be altered to keep government attuned to grievances.

The problem is basically an administrative one. As I indicated earlier, it is not one simply of civil rights. When civil rights activities cause administrations to run scared, the result is a tendency to improvise to meet crisis situations in redressing citizen grievances. More reasoned, orderly public administrative processes could overcome the difficulties of acting only after the panic button has been pushed. Governments have tended to develop impromptu responses to pressures rather than structured operational methods for redressing citizen grievances, to the detriment of both, the government and its citizens. Based upon our inventories of redress mechanisms in the urban areas of California, it is obvious that what is needed is planned, phased administrative and structural reform that could make our government better able to handle grievances and in the process become better demonstrations of the success of democracy.

It has been said with full justification that we are not only a Nation of immigrants, but one which has freely borrowed and adapted governmental processes and institutions to suit our needs. You, sir, as a Senator are part of our borrowings from Rome. Your colleagues in the other House with its speakership are involved in an adaptation of a British governmental invention. The separation of powers doctrine is, of course, originally a French governmental philosophy.

Particularly in our cities, we are operating under legal machinery more appropriate to the simple agrarian society of Old England from which we inherited our common law base. We may be so uncritically enamored of the virtues of our system of common law that we have not perceived the appearance of novel forms of injustice for which existing procedures for adjudication are inadequate. Under today's conditions, large masses of our population cannot obtain redress for many of their grievances against government, whether those grievances be real or imagined, from the great writs of American jurisprudence or traditional redress mechanisms. These are complicated, time and money consuming procedures. Why not then, continue our borrowing tradition to meet the needs of the day and utilize the ombudsman, or at least ombudsmanic concepts?

In our rightful concern for the relationships between the governors and the governed, there is a need to improve democratic processes for adjudicating accusations of noncriminal maladministration.

We have found that imperfections exist in the operation of present institutions dealing with the redress of citizen grievances. The problem is to counterbalance the despair of the individual in his confrontation with the unyielding monolithic public agency which may be follow-

ing perfectly legal procedures and still treat citizens unfairly because its monopolist position enables it to ignore individual plaints.

The Institute for Local Self Government has concluded and we have so reported in its research for the President's National Advisory Commission on Civil Disorders, that the social tensions and disturbances which beset our times will not be alleviated simply by improving mechanisms for the redress of grievances. Many of the ills of our time, of which the alienation of citizens from the governments meant to serve them is but a symptom, call for solutions which are essentially political. This committee's deliberations should proceed with the full understanding that neither improved grievance procedures, nor legal services or information and referral agencies can be expected to cope with basic social disorders. Profound social and economic dislocations call for political solutions. While we who deal with citizens' perplexities and grievances may be able at times to identify the underlying causes of distrust and discontent, such identification will not erase the main imperfections in contemporary America. My point, sir, is that both the political solutions and the improvement of complaint machinery must proceed simultaneously, both are essential if we are to make progress in the long struggle of mankind to convert the polls of the Greek city-State into cosmopolis—the state neither of the Athenians or the Romans, but of the human race; the state in which men at last may resolve the eternal riddle of liberty under law.

This committee's opinions and recommendations concerning the utility of an ombudsman on a selective basis with reference to specific Federal agencies can be supported by those of us who may be considered ombudsmaniacs. It is fully in line with the suggestions of the report of the 32d American Assembly held at Arden House in New York, 3 months ago. In preparing that report, "The Ombudsman," a very distinguished group of Americans debated ombudsmanic ideas for 3 days and agreed to "* * * Recommend that application of the concept be undertaken at the Federal level." I am certain that this committee has had access to the report and that the list of over 50 truly outstanding participants in its preparation lends sanction to the highest magnitude to the discussions here this morning.

Senator LONG. If the witness would pardon an interruption at this time, I would like to place in the record the report of the American Assembly that you referred to. Without objection it will be done.

(Report referred to above follows:)

THE OMBUDSMAN—The American Assembly, Columbia University

(Report of the Thirty-Second American Assembly, October 26–29, 1967, Arden House, Harriman, New York)

PREFACE

On October 26, 1967, the Thirty-second American Assembly—on *The Ombudsman*—opened at Arden House, on the Harriman (New York) campus of Columbia University. There were 72 participants from the worlds of business, education, communications, labor, and government; and from the clerical, legal and military professions.

For three days, in small discussion groups, they considered in depth various aspects of citizen grievance and redress vis-à-vis government (local, state, and federal); and on the fourth day in plenary session they reviewed and approved the report contained in these pages.

As background for their discussions participants read a volume entitled *Ombudsmen for American Government?* prepared under the editorial supervision of Dr. Stanley V. Anderson of the University of California at Santa Barbara, with chapters and authors as follows:

Chapter 1—*The Spread of the Ombudsman Idea*—Donald C. Rowat, Carlton University, Ottawa, Canada.

Chapter 2—*Transferring the Ombudsman*—William B. Gwyn, Tulane University.

Chapter 3—*State Government and the Ombudsman*—John E. Moore, University of California (Santa Barbara).

Chapter 4—*The Ombudsman and Local Government*—William H. Angus and Milton Kaplan, State University of New York at Buffalo.

Chapter 5—*Proposals and Politics*—Stanley V. Anderson.

Appendix—*Annotated Model Ombudsman Statute*—Walter Gellhorn, Columbia University.

Regional Assemblies on *The Ombudsman*, making use of the above-named chapters and the American Assembly conference technique, will be held across the nation with the cooperation of other educational institutions.

The report of the Thirty-second American Assembly reflects the views of the participants in their private, not their official, capacities. The American Assembly itself, a non-partisan educational organization, takes no position on matters it presents for public discussion; and The Ford Foundation, which generously provided support for this program, similarly takes no official position on the opinions contained herein.

CLIFFORD C. NELSON,
President, The American Assembly.

FINAL REPORT OF THE THIRTY-SECOND AMERICAN ASSEMBLY

At the close of their discussions the participants in the Thirty-second American Assembly on *The Ombudsman* reviewed as a group the following statement. The statement represents general agreement; however no one was asked to sign it, and it should not be assumed that every participant necessarily subscribes to every recommendation.

Millions of Americans view government as distant and unresponsive, if not hostile. Though often the targets of the resentment which ensues, government officials are usually not the cause of remoteness, but sometimes its victims. Dehumanized government derives from the impersonality of modern mass society. Improving the means by which individual citizens can voice dissatisfaction with governmental action or inaction will make for a more democratically effective society.

Many devices—governmental and private, formal and informal—already serve to amplify the voice of the individual in the halls of government. Administrative agencies may provide him internal avenues of appeal. Courts may hear his case. Elected representatives may handle his complaint. Public legal aid may be available. News media or private organizations may take up his cause.

All these means of access to government are useful. We should strive further to improve them. Because these existing devices have important functions to serve other than handling citizens' complaints, there is a need in today's large and complex government for mechanisms devoted solely to receiving, examining, and channeling citizens' complaints, and securing expeditious and impartial redress. We believe that American utilization of the Ombudsman concept will help to fill that need.

What is an Ombudsman?

The Ombudsman is an independent, high-level officer who receives complaints, who pursues inquiries into the matters involved, and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are persuasion, criticism and publicity. He cannot as a matter of law reverse administrative action.

What Does an Ombudsman Do?

When the Ombudsman receives a complaint which seems to him to have validity, he asks the agency for an explanation. If necessary he consults further with the complainant and again with the agency. He reports his findings to those

concerned. He may suggest a specific remedy to correct individual injustices and he may suggest an improvement in agency procedure.

After consideration, if he finds a complaint to be unfounded, he may discover that the agency has failed adequately to explain its action to the citizen. In this case he may urge the agency to improve its techniques of communication. In other cases he may report to the complainant why his grievance was unfounded. In addition to handling individual complaints, the Ombudsman may make studies and recommendations for the improvement of administration.

The Ombudsman proceeds without cost to the complainant. He is able to operate informally and expeditiously without formal hearing procedures.

Establishment of an Ombudsman

We recommend that Ombudsman offices be established in American local and state governments. We do not recommend the establishment of a single office of Ombudsman for the entire federal government, but we do recommend that applications of the concept be undertaken at the federal level.

The Ombudsman must be selected in a manner which assures public confidence in his independence, impartiality and professional attainments. He should be given a salary which will reinforce his high status in the community.

The Ombudsman should designate his own subordinates. The Ombudsman's term of office should be sufficiently long to minimize his preoccupation with reappointment and should not be coterminous with that of the selecting authority. Provision for his removal from office for cause should be made in such manner as not to interfere with his independence while in office.

The authority of the Ombudsman should extend to public agencies exclusive of courts, legislatures and chief executives. On the other hand, the experience of California and other states with a commission on judicial qualifications—an ombudsmanlike institution—should be given serious consideration as a means for reducing the abuse of judicial authority.

Since American local governments vary greatly in size, population, and legal structure, no uniform design need be followed and advantages are to be derived from experimentation. Such experimentation should include meaningful accessibility to the Ombudsman by all sectors of society.

How Far Does the Ombudsman Go?

An Ombudsman, concerned with mistaken or imperfect action, is a valuable resource. But an Ombudsman often can not provide all the help a citizen may need when confused by or in conflict with the officials who administer public affairs.

At times the citizen must have recourse to an active advocate who can press a demand on his behalf or plan a defense against governmental action. This need is for adequate legal services. Then, too, citizens require information about governmental services. This need is more properly provided by easily accessible information and referral agencies.

Of course, neither an Ombudsman nor legal and information services can eliminate profound social and economic injustice, which calls for essentially political solutions.

While the Ombudsman does not make policy, his office has two important indirect effects on policy-making. First, the Ombudsman's findings provide the Legislature and the Executive with additional significant information and advice upon which to base major policy improvements. Secondly, the legislative process is enhanced to the extent that the Ombudsman's existence permits and encourages legislators to give increased attention to lawmaking.

Conclusion

We urge the prompt enactment of laws to create the special office required to handle citizens' complaints—the Ombudsman.

Mr. HAMILTON. I might suggest, Senator, that the previous witness mentioned two persons of eminence in this field, Prof. Walter Gellhorn and Prof. Kenneth Culp Davis, both of whom were signatories of the report you just inserted into the record.

Even if the perfect governmental agency existed, citizens would still find some cause for complaint. It is essential that at all levels of government, the perfect agency and the not-so-perfect one, hear and respond

to its citizens by better attunement of complaint and grievance handling machinery. Many now call for a third party critic to make certain that a complaint receives a fair hearing for his grievance and, if justified, a proper remedy.

The most popularly current model of the third party for this purpose is the ombudsman. He can be characterized briefly as a high level officer, with adequate salary and staff, free and independent of both the agencies he may criticize and the power that appoints him, with long tenure of office sufficient to immunize him from the natural pressures concurrent with seeking reappointment, with power to investigate administrative practices on his own motion. He is a unique officer whose sole job is to receive and act on complaints without the necessity for charge to the citizen. He should have the power to subpena records. He operates informally and expeditiously without formal hearing procedures. His principal corrective weapons are publicity, criticism, persuasion, and reporting. He does not have the power to either punish maladministrators or reverse administrative decisions.

With those understandings and in response to the committee's acknowledgement of our major interest being at the local level of government, I will move to the final phase of my presentation in discussing the utility of ombudsmanic concepts there. We see the ombudsman as a supplement to existing redress procedures which, if they exist at all, tend to be episodic, partial and selective; leaving an aggrieved citizen frustrated as a result of his dealings with administrative agencies that have been delegated quasi-judicial and quasi-legislative as well as executive powers.

Any discussion of the ombudsman, particularly at the local level, should be accompanied by the caution ably sounded by Prof. Walter Gellhorn who, while the ombudsman's most popular American proponent, is also a sober critic of those who think that the transplantation would create a transformation. While an ombudsman would, as he says, "substantially adorn the American Governmental scene, it would not remake the scenery."

The ombudsman is not a substitute for either civic reform or bureaucratic responsibility. An ombudsman can isolate aberrations; he can suggest better ways of reaching agreed ends; he can point out new applications of previously accepted concepts, but as Professor Gellhorn states "what he cannot do is force hesitant officials to embrace a philosophy created by him." (Gellhorn, "Ombudsman and Others," p. 439.)

A second note of caution emerges from the work of Rowat, Moore and others: An ombudsman will not be able to deal with many of the things that most deeply aggrieve some elements of the citizenry. He is, in short, not quite a combination of George Washington, Abraham Lincoln, Moses, and Will Rogers. The ombudsman is an administrator of administrative decisionmaking. He is neither a pathfinder for citizens through bureaucratic mazes nor an umpire tallying policy decisions.

Many citizen complaints clearly pertain to policy choices which must be made by bureaucrats and legislators. Should a city's view of the waterfront be cut off by a freeway in the furtherance of an interstate highway network? Should a Job Corps center be estab-

lished in a quiet Missouri town of 15,000? Should a treatment center for a growing number of narcotics addicts be built at all; and, if so, where? Should restaurants be subjected to more rigid controls in the interests of public health. Should tuition be charged for the first time at a great American university. While these are, of course, important questions about which citizens can and should make their opinions known—vocally and otherwise—they are essentially policy decisions about which an ombudsman will be little concerned.

Nowhere is the ombudsman a creator or critic of public policy. He is not a reviewer of the policy decisions made primarily in political arenas. While he may criticize a department for reaching a decision not in accordance with facts or required administrative procedures, the policy decisions at any level of American Government are those in which the ombudsman will not participate and which he could not seek to supplant.

To some in our society, "politician" is a word dirty enough for enshrinement on public toilet walls. No matter how much people of that view want to expunge it from the community vocabulary, they are mistaken if they think it can or will be replaced by the word "ombudsman." "No matter how able an ombudsman may be, no matter how venerated by the public, he cannot supplant the political processes that in the end control the administration of public affairs," says Professor Gellhorn again.

The ombudsman is not a super administrator. He is not one anywhere. He is now operating, and it is a useless dream to think we can create a wizard of our's. As Professors Angus and Kaplan have noted, he is not a general supervisor of public services nor an overseer of those that do. Alleged deficiencies or failures in service or unimaginative exercise of the police power cannot be overcome by ombudsmanic wand waving. Anyone who thinks that an ombudsman at the local level will keep the streets in repair, remove the trash from a public park or stop firetrucks from sirenic wailings in the middle of the night is bound to be quickly disillusioned.

Fortunately for democratic processes, deciding the proper order of priorities and the setting of public policies will continue to be the job of the department officials and legislators. An ombudsman will bring no comfort to those who wish that another order of priorities had been chosen. His notation that the staff of the street maintenance department is too small to give proper service is far, far different from making the policy decisions to increase the staff; or, from deciding that the potholes on Boardwalk and Park Place will be filled before those on Baltic Avenue.

Nevertheless, there remains the need for serious consideration of new methods for the redress of citizen grievances or the improvement of existing ones, some of the categories of need are:

Complaints against discretionary decisions wherein the citizen disagrees with the manner in which an official has exercised his discretion but has no formal means of challenging it; or, at least, inexpensive means. The complaint in these cases is generally not that of the official abusing his power, but that the decision reached is not, in all circumstances, appropriate. There may be no allegation of bias, negligence or incompetence but merely the charge that the decision is misguided. In essence, this type of complaint is one that has not a right of appeal

to an independent body which can substitute its discretionary decision for that of the official who made the original one.

Grievances against acts of maladministration, in essence not a question of appeal from, but of making an accusation against an authority.

In new and previously unperformed functions, there is an absence of settle case law and, as I have previously indicated, only vaguely applicable common law. Few people, most of all the underprivileged, know what their rights or obligations are. In the absence of progressive legislation or good case law, there often exists inadequate or inappropriate mechanisms for appeal against real or alleged grievances. There is, consequently an institutional lag. In addition, in words popularly current here, there is what might be called a grievance gap as applied to the newer functions, particularly those involved in the processes of urbanization.

The areas latterly mentioned are quite legitimate ones for ombudsmen. They are sorely needed there. But again, caution should be noted. The ombudsman is not snake oil. Selling the concept as a panacea for society at large does the concept an injustice. The office should not be looked on as a replacement for genuine reform in the structure of government, most particularly reconsideration of the methods for providing people-oriented services. The ombudsman is, at best, a supplemental remedy for the redress of citizen grievances. There are others, such as the Amparo processes as found in Mexico and elsewhere.

In conclusion, I suggest that the redress of citizen grievances is a matter worthy of continuous consideration by this committee. It should not be said of us, as it was of Henry III of England, that he was "more pious than wise in that he heard mass three times a day but refused to listen to complaints." Communication between the citizen and his government is at the heart of any redress procedure. People must be aware of where government is and what it is doing; government must be able to hear what citizens want and need. When this becomes so, then we can change the folklore that now has it "that you can't fight city hall." I take it that we are agreed that in a democracy this is intolerable.

Thank you.

Senator LONG. Thank you, Mr. Hamilton, for a very fine statement.

I have looked over your biographical sketch here and am impressed with your very distinguished background. Without objection, I am going to ask that it be placed in the record prior to your remarks.

Mr. HAMILTON. Thank you for your courtesy, Senator.

(Biographical sketch referred to follows:)

CONDENSED BIODATA SHEET, COMMITTEE WITNESS, RANDY H. HAMILTON, JANUARY 16, 1968 (EXECUTIVE DIRECTOR, INSTITUTE FOR LOCAL SELF GOVERNMENT, CLAREMONT HOTEL, BERKELEY, CALIF.)

EDUCATION

A.B., U. of North Carolina, M.A., U. of North Carolina, M.CR.P., U. of North Carolina, Ph. D., International University, Zurich, Switzerland.

WORK EXPERIENCE

City Manager, Carolina Beach, N.C.—Associate Director and Washington Director, National League of Cities—Municipal Advisory, City of Bangkok, Thailand—Local Government Advisor, Royal Government of Thailand—Director, United Nations: Institute of Public Administration Comparative Urban Studies

Project—Currently Special Project Director, League of California Cities and Executive Director, Institute for Local Self Government.

TEACHING EXPERIENCE

Faculty member or visiting professor at University of North Carolina, American University in Washington, D.C., Thammasat University in Bangkok, University of Southern California, San Francisco State College, University of California at Berkeley.

PROFESSIONAL MEMBERSHIPS

Full member, International City Managers' Association—Former national council member and President of the North Carolina Chapter of the American Society for Public Administration—American Political Science Association—Former President, North Carolina Chapter Pi Sigma Alpha (National Honorary Political Science Fraternity).

HONORS

"Man of the Year, 1950" Carolina Beach Lions Club—Decorated by the King of Thailand for "outstanding services to Local Government", Knight Commander of the Order of the Crown of Thailand, 1963.

PUBLICATIONS

One book on comparative municipal government and more than 50 articles in professional journals of several countries.

CONSULTANCIES

Local government consultant to: Time-Life-Fortune Magazines,—Committee for Economic Development (CED),—Chamber of Commerce of the U.S.,—More than a dozen Federal advisory committees, etc.

Senator LONG. Mr. Hamilton, a few months ago I was in Berkeley and had the opportunity of visiting with Speaker Unruh who has some connections with Missouri. I had a letter from him just a few days ago, and I know that he has been trying from time to time to get this ombudsman concept started in California. Would you comment about some of the problems or difficulties he has had? I am sure you have worked closely with him.

Mr. HAMILTON. In California, the reverse of the situation in the U.S. Congress is so with reference to the ombudsman. There it has been the assembly or our lower house which has taken the lead.

Twice the bill has passed the lower house. Twice the upper house, the senate, has failed to even have hearings in committee. I think there will be more consideration of it in the current session of the California legislature. Senator Dymally, of Los Angeles, has introduced a companion bill to Speaker Unruh's bill and that is the first time there have been companion bills.

Basically the problem has been not that anyone was opposed to the ombudsman. But, the first time around nobody knew what it was. The second time around having learned what it was they began to be troubled by some of the problems of application.

California has a population that is, in fact, greater than all of the countries now using an ombudsman with the exception of the parliamentary commissioner in England.

We are a State, as you know, of large size, and an absence of homogeneity in population. The critics of the proposal, utilizing our large population, our large or great geographic size, the disturbances which beset our various classes of citizens, were able to postpone consideration of the bill. I think, sir, that the third time will be the time, because

the answers to the questions that were raised during the second consideration of the bill have now been provided.

There is no concept of utilizing one ombudsman for all State agencies sitting in one city, Sacramento, as was the charge by those who were opposed to it the last time, in addition to which, a good deal of citizen support for the ombudsman has come about in the last couple of years. The Friends Committee on Legislation supports it, and now, God bless them, the League of Women Voters are out in favor of it.

Senator LONG. I spoke to the Senate when I was in Sacramento at the time I mentioned a while ago. After seeing the decorations of that Senate Chamber, I am surprised they are a liberal progressive body with those decorations because they are rather outstanding.

Mr. Hamilton, has it been your thought that the ombudsman serves as sort of a steam valve by which the citizens, administrators, and the legislatures can sometimes let off steam? Do you think this would be some basis, some help in solving your problems or would it be of assistance to them?

Mr. HAMILTON. Yes, sir; and I do not think that that particular aspect of an ombudsman role should be denigrated. It is a fact that the examination of cases of ombudsmen in the foreign countries and, indeed, the one ombudsman that existed in this country for a year in Nassau County, plus the ombudsman who has existed for 7 months in the city of San Diego, indicate that somewhere about 8 out of 9 or 10 complaints are unfounded. But when the citizen is advised of the reason for the decision, or the reason why his complaint is unfounded, he tends to go away as a happy and satisfied customer of Government, which in fact he is.

I think that the greatest testimony that can be given to the ombudsman concept is that now there are some retail establishments, in California, which advertise in the press that "we have an ombudsman." The complaint window at the department store in some of the areas of California has now been replaced by an ombudsman window, in other words, the attempt on the part of business to create a happy customer. I think the role you have outlined for the ombudsman in that regard is most applicable.

If I may refer to my own experience as a former city manager, I know that when I had time to sit down with a citizen and explain why we had arrived at a particular administrative decision, he tended to go away a much happier citizen.

We could not chop down trees in my home State of North Carolina to widen streets because most trees were planted in honor of somebody's grandfather who was deceased or killed in the late unpleasantness between the States.

Senator LONG. They can't build streets in Rome for the reason they have to go around some ruin they have dug up, too, so I guess they have had that problem for many years.

Mr. HAMILTON. But if we sit down with U.D.C. and explain why we are doing it and suggest the plantation of another grove elsewhere for a truly living memorial, we could be successful in chopping trees down. But without taking the opportunity to explain to the citizen, we were not. The ombudsman is most utilizable in that regard, sir.

Senator LONG. Thank you very much. Mr. Kass, any questions?

Mr. KASS. Yes, just one or two, Mr. Chairman.

Mr. Hamilton, the problem of size, as I explored with the chairman of the Administrative Conference, is one of the most serious obstacles toward the creation of a Federal ombudsman. You have done considerable work in the State and local area. What about the possibility of creating the regional type of ombudsman that I explored with Chairman Williams? Do you think this will work as an experiment at the Federal level?

Mr. HAMILTON. I would think so, but I would imagine that the regional definition would be based rather than on State lines on the jurisdictional lines of the agency concerned. In other words, since 1937 in this country we have been trying to get Federal agencies to have the same regions. Quite obviously the FAA does not have the same region as the VA or the Federal Bureau of Prisons or HUD or HEW. Consequently, I do think in answer to your question specifically, that a regional application will work provided the jurisdiction of the ombudsman conforms to the administrative region of the agency to which his work is addressed rather than to an artificial geographic area, say, the States of California, Nevada, and Colorado.

Mr. KASS. So, if an experimental ombudsman were created with jurisdiction over complaints of all citizens residing in, for instance, the State of Missouri or the State of California, even though this did tend to cross State lines as far as Federal agencies are concerned, you think this would cause problems?

Mr. HAMILTON. Yes, I do; because the regional office may not be located in that State.

Mr. KASS. I see.

Mr. HAMILTON. Accessibility is to my mind at the heart of the grievance mechanism.

Mr. KASS. Access to the appropriate official?

Mr. HAMILTON. Yes.

Mr. KASS. But now, if the ombudsman had access through the use of telephones—part of the process as we understand it is that the ombudsman doesn't necessarily have to make field investigations, but can accomplish the same thing through telephone calls and letters if people had access to the ombudsman living in St. Louis or Berkeley or some place, and this ombudsman had jurisdiction and had access to literally everybody.

Mr. HAMILTON. Yes; if he had the access to the officials and the records, then it would work.

Mr. KASS. This would work.

Now, you mentioned the concept of amparo. Could you just for about a minute explain what it is and, with the chairman's permission, we would like to put the document that you prepared into the Appendix of this hearing record.

Senator LONG. Without objection that will be placed in the record.

Mr. HAMILTON. The amparo is a concept of Mexico particularly. It is a writ, and a constitutional right, which allows an individual to proceed against an administrative action without proceeding against the law under which the administrator is acting.

It is before the Federal judicial authorities. The plaintiff is always an individual. One of its unique and distinct features is that the doctrine of stare decisis does not apply; and, consequently, the judge when he hears this plaint does not have to worry about judges 20 years

from now looking back to say that was a pretty stupid decision. He only has to be concerned with the individual complainant before him, and arrive at an equitable decision in that case which has—and does not set precedents.

Mr. KASS. There is no precedential significance.

Mr. HAMILTON. This is the unique feature.

Mr. KASS. This concept applies only in the State of Mexico and in the State of California which adopted the Mexican Constitution?

Mr. HAMILTON. It existed in California before 1849. We did some research to find out what happened when we wrote an English constitution. California when it became part of the Union, had to have an English constitution, and we could find no reason why it dropped out. It just didn't get translated.

Mr. KASS. But this would have no application for other State levels?

Mr. HAMILTON. Yes; it has. It has an application in the minds of a good many people. I have talked to a good many Mexican-American people and they have an idea that amparo applies in the Anglo-Saxon or Romanic court.

What I am suggesting is this: In Mexico when a person pleads "guilty" he expects amparo process to be applicable, expecting that the judge will not only look at the law, but will look at the whole situation. He does not understand, members of the Mexican-American community in the West do not understand, when they plead "guilty" to a criminal violation in America that the judge does not do anything except look at the law rather than extenuating circumstances. That he does not have discretion as he has in Mexican procedure. It has been testified before the California Assembly by the president of the Mexican American Political Association, Mr. Bert Corona, who is a member of the U.S. Commission on Civil Rights, that in his opinion the Mexican American community in California does not understand that the ability of a judge in Mexico to temper justice with mercy is not applicable to a judge in a criminal procedure in California.

Mr. KASS. Thank you, Mr. Hamilton. No further questions.

Senator LONG. Mr. Waters?

Mr. WATERS. Mr. Hamilton, I believe you said that there is in San Diego an ombudsman who has been active for several months. I wonder if you are familiar with the work of that ombudsman.

Mr. HAMILTON. Yes; I am, sir.

Senator LONG. Is he generally accepted by the agencies with whom he works?

Mr. HAMILTON. Yes, he is. He is in the office of the city manager, and his title is "Citizens' Assistance Officer." He is accepted by the agencies, I suppose, because of the background muscle or the inherent clout of anybody from the city manager's office in council. But he happens to be a particularly soft-spoken and judiciously tempered individual, and so far as he advises me—and I am in fairly frequent contact with him—he is perfectly acceptable, most importantly by agencies outside of city hall. He finds his success equal with agencies over which he does not have legal jurisdiction as he does with agencies who would legally come under the purview of the city manager; for example, the county welfare agency, the health agency, and the highway department, and other agencies. When he explains to the administ-

trative officer the problem involved, he finds extremely good cooperation.

Senator LONG. Thank you very much. What is that citizen's officer's name?

Mr. HAMILTON. Larry Haden.

Senator LONG. Thank you, Mr. Hamilton, for a very fine statement. It has been extremely helpful to the committee.

Mr. HAMILTON. Thank you, sir.

Senator LONG. Our next witness is Mr. Guy S. Williams, Assistant Director for Contact and Foreign Affairs of the Veterans' Administration.

Messrs. Williams are at least 50 percent of the witnesses today. We are glad to have your associate with us. I judge you have a prepared statement.

STATEMENT OF GUY S. WILLIAMS, ASSISTANT DIRECTOR FOR CONTACT AND FOREIGN AFFAIRS, VETERANS' ADMINISTRATION; ACCOMPANIED BY PHILIP V. WARMAN, DEPUTY ASSISTANT GENERAL COUNSEL

Mr. GUY WILLIAMS. Yes, sir.

I am accompanied by Mr. Philip V. Warman, Deputy Assistant General Counsel of the Veterans' Administration.

I appreciate the opportunity to appear and discuss S. 1195, a bill before this subcommittee which would establish the Office of Administrative Ombudsman to investigate administrative practices and procedures of the Social Security Administration, Veterans' Administration, Internal Revenue Service, and the Bureau of Prisons. I submit for the record the Administrator's report which states our position on the bill and points to the existing aids to claimants before the Veterans' Administration. These aids include the VA Contact Service and representation by service organization representatives. We have a detailed statement which, with the chairman's permission, I would like to submit for the record and which I will briefly summarize now.

Senator LONG. Without objection, it will be placed in the appendix of the hearing record.

Mr. GUY WILLIAMS. I understand you are interested in the assistance now available to veterans and their dependents from VA and non-VA sources in the presentation and prosecution of their claims for Veterans' Administration benefits.

The Veterans' Administration has contact representatives stationed in each of its 230 locations. It is the job of the contact representative to know by heart the requirements for each benefit, how to apply, the administrative procedures involved, and how best to assist the claimant in bringing out the facts that will present his claim in its most favorable light. He must be knowledgeable on many diverse benefit programs—compensation, pension, education, insurance, hospitalization, outpatient medical and dental care, wheelchair homes, paraplegic lifts, housing loans, guardianship, burial benefits, automobiles, and many others, as well as benefits available through other Federal or State agencies.

Senator LONG. Now, Mr. Williams, are they Federal employees?

Mr. GUY WILLIAMS. Yes, sir.

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Senator LONG. Don't some of the States have veterans' agents something like we have in Missouri?

Mr. GUY WILLIAMS. That is correct.

Senator LONG. Which actually is nearly a State ombudsman; isn't that right? Isn't that the type of work they do?

Mr. GUY WILLIAMS That is correct. But we feel when we are talking to a man, and we have knowledge that he may be eligible for some benefit from a State agency, we will cue him in on this and help him to get to the person who can give him further assistance.

Senator LONG. But the State agency, though, assists the man, as I understand it, in preparing his claim for benefits or in getting him into a Veterans' Hospital.

Mr. GUY WILLIAMS. That is correct.

Senator LONG. Even though there is no State benefit available?

Mr. GUY WILLIAMS. Right. He determines what additional benefits the claimant may be eligible for beyond those specifically requested and assists in the preparation of the proper claim.

The contact representative also determines the actions necessary and files claims for veterans who are too ill to act in their own behalf, many of these claimants are patients in hospitals who have no one else immediately available to act for them.

Of the 2.5 million personal interviews conducted by contact representatives during fiscal year 1967, thousands were conducted with persons who were not satisfied with the outcome of their claims for benefits. Many of these were resolved to the complete satisfaction of the claimant by sitting down and going through the VA file with him and explaining the requirements of the law and regulation and, where indicated, assisting him in obtaining the evidence that might result in favorable action.

Unique and effective services are also provided claimants for VA benefits by the national service organizations, the American Red Cross and recognized State service organizations, which the chairman mentioned. Accredited representatives of these organizations number nearly 3,200.

Any claimant may file a power of attorney with one of these organizations and be assured that a skilled technician representing that organization in the VA regional offices and insurance centers will assist him fully in the presentation of his claim, and will review each action taken often as the claim is in process, to assure that the claim is fully developed and fairly and properly disposed of. If the claimant or the organization representative expresses disagreement with the decision and finally appeals it, a representative of the service organization appears in the claimant's behalf before the Board of Veterans' Appeals.

Field representatives of these service organizations visit all VA offices and VA hospitals regularly and submit written reports of their findings to their national headquarters which in turn submits them to our central office for any indicated investigation and reply.

This completes my formal presentation and I will be pleased to answer any questions of the subcommittee on the proposal.

(Statement of Mr. Guy Williams follows:)

STATEMENT OF GUY S. WILLIAMS, ASSISTANT DIRECTOR FOR CONTACT AND FOREIGN AFFAIRS, VETERANS ADMINISTRATION, BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURES, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, JANUARY 16, 1968

I appreciate the opportunity to appear and discuss S. 1195, a bill before this Subcommittee which would establish the Office of Administrative Ombudsman to investigate administrative practices and procedures of the Social Security Administration, Veterans Administration, Internal Revenue Service and the Bureau of Prisons. I submit for the record the Administrator's report which states our position on the bill and points to the existing aids to claimants before the Veterans Administration. These aids include the VA Contact service and representation by service organization representatives. We have a detailed statement which, with the Chairman's permission, I would like to submit for the record and which I will briefly summarize now.

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This completes my formal presentation and I will be pleased to answer any questions of the Subcommittee on the proposal.

Senator LONG. Mr. Kass?

Mr. KASS. Thank you.

Mr. Williams, as I understand the contact system of the VA, when a veteran or anybody, for that matter, walks into a local VA office, he is assigned a contact man. In effect, the first person he sees may be the contact man?

Mr. GUY WILLIAMS. That is correct.

Mr. KASS. And the contact man is responsible for that individual until the problem or complaint has exhausted all possibilities within the VA?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. How long has this system been in existence?

Mr. GUY WILLIAMS. It has been in existence at least as far back as 1924. It is embodied in the World War Veterans Act of 1924.

Mr. KASS. And this is a formal office rather than just a loose, ad hoc kind of approach?

Mr. GUY WILLIAMS. That is correct.

Mr. KASS. Embodied in your regulations?

Mr. GUY WILLIAMS. Right.

Mr. KASS. To your knowledge, have any other agencies of the Federal Government established a form of contact system?

Mr. GUY WILLIAMS. Not to my knowledge—that is, not with the same kind of responsibility for protecting the interests of the claimant as well as being a representative of the agency itself.

Mr. KASS. Now, when a claimant or a veteran or anybody walks into the VA local office and has a problem or a complaint, does the contact man have access to the entire file?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. If the veteran is represented by a service organization—VFW, DAV or something like that—would they have access to the same file?

Mr. GUY WILLIAMS. Yes, sir; complete access.

Mr. KASS. So there is complete access to the file of the individual claimant or veteran?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. In your formal statement which you submitted for the record, you make reference to the FX exchange telephone system?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. What exactly is that?

Mr. GUY WILLIAMS. It is a system whereby a veteran in, let's say, a small city in Missouri, might dial a local number on his own telephone without any charge and be connected with a contact representative of the Veterans' Administration in St. Louis, who would have access to his records and could immediately answer questions.

Mr. KASS. There is no long distance charge to him?

Mr. GUY WILLIAMS. That is correct.

Mr. KASS. Do you publicize this type of service?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. Now, do any of the other Federal agencies utilize this type of service so that if I, as a citizen having a complaint against the Social Security Administration, the Internal Revenue Service, or any of the other agencies, have a complaint and am located some distance from the regional office, could I use your phone or any other phone system to call in without charge?

Mr. GUY WILLIAMS. I understand that the Social Security Administration has done some experimentation in setting up an FX or foreign exchange system for themselves. Just how far they have gone, I am not sure.

Senator LONG. Mr. Kass, let me interrupt you a minute. Do I understand you to say that in Bowling Green, my hometown, there is that type of system where a veteran can dial a particular number and reach the Veterans' Administration in St. Louis and talk to someone about his problem or complaint without a long-distance call charge?

Mr. GUY WILLIAMS. Not at this time, Senator. We are running a pilot operation actually.

Senator LONG. I see.

Mr. GUY WILLIAMS. We have FX telephone service in 12 large communities at this time.

Senator LONG. Is it your plan to go into it so that the system will be nationwide?

Mr. GUY WILLIAMS. Yes, sir. We plan to have about 74 cities covered by fiscal year 1969.

Senator LONG. Your plans are, though, to have it in all towns of any size?

Mr. GUY WILLIAMS. Yes, sir.

Senator LONG. Suppose a veteran calls the St. Louis VA office, would he be assigned a contact man?

Mr. GUY WILLIAMS. Yes, sir; if you pick up the phone and call St. Louis, you would get a contact representative who would give his name, and ask the veteran to refer any further questions on his case to him.

Senator LONG. Mr. Kass, you mentioned the agency I have heard a little about—the Internal Revenue Service. It seems to me the things that we get a lot of complaints about concerning the IRS is that the citizen either gets a form back filled out by a computer, or they talk to one fellow today and somebody else tomorrow; nobody knows about their particular problem one way or the other. Would you think perhaps some of the big problems citizens have with that agency is the cold mechanism that they come in contact with when they have complaints, instead of a warm, personal individual they get when they call your agency?

Mr. GUY WILLIAMS. Well, all I can really testify to, sir, is our contact service, but I would like to say that the first requirement is that these people have an image of themselves as talking to their own brother when they talk to this client.

Senator LONG. It is much warmer talking to an individual or brother than to just a cold computer.

Mr. GUY WILLIAMS. Right.

Senator LONG. It might be desirable if some of the other agencies would think along those lines. I think you are to be commended for it certainly.

Mr. GUY WILLIAMS. I am in favor of it personally.

Senator LONG. I think you are to be commended for it because, incidentally, that has a close relationship to the ombudsman theory we are talking about here.

Pardon me for interrupting, Mr. Kass.

Mr. KASS. This, in effect, is a built-in ombudsman that the VA has instituted?

Mr. GUY WILLIAMS. Yes, sir; from all I have heard of the ombudsman, I would say you are correct.

Mr. KASS. Therefore, getting back to my earlier question about regional ombudsman, this would have application to the regional idea of ombudsman so that everybody in the State could call his local VA office, but they also could call their ombudsman wherever he would be located so there would be instant access or easy access to the ombudsman as well as to the Federal agencies?

Mr. GUY WILLIAMS. Yes, sir.

Mr. KASS. As it is being programed. Thank you, Mr. Chairman.

Senator LONG. Mr. Williams, I saw a letter just the other day where an application had been made for a substantial refund from the Internal Revenue. It was just a blank form which was filled out which says he didn't get it filed on time or words to that effect. No signature or anything else to it. Very cold, very impersonal. Whether it was put out by a typewriter or computer, I don't know. But your mail that goes out is signed by an individual who has personal contact with your contact man or ombudsman who is handling the veteran's case?

Mr. GUY WILLIAMS. To a large degree; yes, sir. We do have some computerized letters. For the most part, computerized letters in the Veterans' Administration are used to advise of decisions of entitlement or awards made. For example, when a veteran applies for educational benefits, he will receive a letter which is a mechanized type of thing saying, "You have so many months of entitlement and are approved to go to George Washington University." The contact program, however, does not use any computerized letters. With the exception of a few form letters which we issue for use by veterans in securing Civil Service preference or commissary privilege ID cards, all contact program correspondence is individually composed, typed, and, we feel, completely responsive to incoming inquiries.

Senator LONG. But when he has a complaint you just don't get a computerized letter saying "we are not going to allow it," and that is it?

Mr. GUY WILLIAMS. No, sir. Any complaint is pounced on immediately by the VA administrative procedure.

Senator LONG. By a live human being and not a computer?

Mr. GUY WILLIAMS. That is correct.

Senator LONG. Yes. You are dealing with humans.

Mr. GUY WILLIAMS. Right.

Senator LONG. And it certainly has much more effect. People have much more confidence, I am sure, with an agency that handles its business on a more personal basis.

Mr. Waters?

Mr. WATERS. No questions.

Senator LONG. Thank you, Mr. Williams.

Mr. GUY WILLIAMS. Thank you sir.

Senator LONG. Our next and concluding witness this morning is Dr. Myrl E. Alexander, Director of the Bureau of Prisons. The chairman has quite a little interest in this Bureau. The chairman is also chairman of the National Penitentiary Subcommittee of the Judiciary Committee, and it is our pleasure to work with Dr. Alexander quite often on a personal, cordial relationship.

Doctor, we are glad you can be here this morning. If you will introduce us to your assistant, we will be happy to hear him and we will be happy to have your statement.

STATEMENT OF DR. MYRL E. ALEXANDER, DIRECTOR OF THE BUREAU OF PRISONS; ACCOMPANIED BY EUGENE BARKIN, COUNSEL

Dr. ALEXANDER. Thank you, Mr. Chairman. I am accompanied this morning by Mr. Eugene Barkin, legal counsel of the Bureau of Prisons.

Senator LONG. Doctor, I am impressed with all of you men bringing your legal counsel along. You don't need a lawyer to protect your rights when you come before this committee—on this type of hearing anyway. But we are happy that both of you are here.

Dr. ALEXANDER. Mr. Chairman, Mr. Barkin is here primarily because he handles so many of the complaints of our 20,000 guests who register complaints.

Senator LONG. He is your ombudsman?

Dr. ALEXANDER. Many of them have requests, including complaints about sentence, sentence computation; and Mr. Barkin handles these. It is for that purpose he accompanies me this morning. I can be my own legal counsel on other questions.

I am indeed happy to be here to present my personal views on S. 1195 with particular reference to the Bureau of Prisons. Moreover, I am appreciative of your interest and acquaintanceship with our problems, Mr. Chairman, in your capacity as chairman of the Subcommittee on National Penitentiaries of the Senate Judiciary Committee.

All too often prisons are thought to be places of rigorous confinement where prisoners have only the most limited means of communication with the outside; that, except for closely censored letters or rigorously supervised visits with his immediate family, a prisoner has no means of communication and is at the mercy of his keepers.

Actually, if that were the true situation, we who administer prisons and correctional institutions would be stupid indeed, because we would have created an intolerable and explosive situation which could not long be contained. Indeed, that kind of administration would no longer be tolerated by the courts or the public.

In actual practice, many channels of communication are available to and can be used without restraint by any or all of the nearly 20,000 inmates in our 28 Federal institutions.

First of all, every person has direct communication access to the Attorney General; to any Congressman or Senator; to the Board of Parole; to any Federal judge; to the Director, Bureau of Prisons; and others in Government.

This direct access is through the prisoner mail box system under which any prisoner may place sealed letters addressed to those mentioned in a special letterbox. The contents of those boxes are sent daily to my office and forwarded unopened to the addressee. Letters addressed to the courts or a Senator or a Congressman, however, are sent directly to the addressee under a form letter by the warden of the institution.

Senator LONG. Some of us have rather extensive correspondence with these inmates.

Dr. ALEXANDER. And rather perpetual correspondence with some of them, Mr. Chairman.

Senator LONG. We get so we can recognize the handwriting.

Dr. ALEXANDER. In a 10-month period from October 1, 1966, through July 30, 1967, there were 6,131 such letters. Almost 900 were congressional letters. Virtually all of them resulted in congressional inquiries to my office to which we responded with the facts requested. Many are addressed to Federal judges. The great majority, however, are addressed to the Bureau staff and to which we respond to the writer.

The letters involve a wide range of subjects: food, disciplinary actions, legal questions, requests for work release, and transfers to other institutions. The program is critically important to us, understood and supported by the wardens and, as I have said, used substantially by the inmates.

We consider the merits of each request. Many raise questions or make claims which cannot be allowed. But we take affirmative action where justified.

Senator LONG. Doctor, may I interrupt you there?

Dr. ALEXANDER. Yes.

Senator LONG. Do you feel that works as a "steam valve," too, or a let-off valve for the prisoner which proves very helpful to him to know that he has the right to write you or his judge or his Congressman while he is in prison?

Dr. ALEXANDER. Yes, sir; we consider this prisoner's mailbox the most valuable safety valve of the entire system. That is why I indicated earlier in my statement that a prison administrator would be stupid indeed if he kept all of the tensions and emotions bottled up with a lid on them.

Senator LONG. You told me that before, but I wanted to get it in the record as to how important it was.

Dr. ALEXANDER. A few examples of responses: An inmate claimed he should have credit for time held in a Canadian jail while awaiting extradition to the United States. The records reflected that he was held for another offense in Canada, in which case jail time would not have been creditable to his sentence later imposed here. But after considerable correspondence, by Mr. Barkin here, with the Queens Counsel in Canada, it was definitely determined that he was in custody there solely awaiting extradition. We then properly granted his request.

A prisoner claimed that he was not granted the work-release privilege although he had completed training and believed himself to be eligible. We investigated. The warden and his staff pointed out that he was 1,000 miles from his eventual parole plan. We transferred him to an institution near his home, he was placed on work release, and continued on the job after release from his sentence.

An inmate complained bitterly to his Congressman that he was not getting any dental attention. Investigation disclosed that he had arbitrarily refused dental care. Further study revealed deep emotional problems. He was transferred to our medical center at Springfield, Mo., where both his mental and dental problems were treated successfully.

We noticed a series of letters from one institution complaining about food. I sent our food administrator to the institution where he discovered the complaints were justified and appropriate changes were made.

I will not elaborate further on the great value of the prisoners' mailbox as a channel of communicating complaints, requests, and charges by prisoners. It is confidential. It works.

Secondly, access to the courts is open and unrestricted. In recent years, the courts have developed a growing and healthy interest in prisoner complaints. Hearings are being held daily and decisions rendered on the merits. This has been a welcome change from just a few years ago when the courts usually did not consider such cases on the grounds that the acts complained of where matters which were solely within the administration discretion.

The courts are now hearing suits involving medical treatment, disciplinary practices, mail regulations, loss of good time, and other numerous subjects. Any communication by letter, note, or writ addressed to a Federal judge is promptly sent to the court without interference or censorship.

Moreover, we have succeeded in enlisting the interest of several law schools in providing legal assistance to indigent inmates in both civil and criminal matters.

Senator LONG. You develop some pretty good lawyers in the prison, too; don't you?

Dr. ALEXANDER. I beg your pardon?

Senator LONG. I say you develop some very good legal minds or lawyers among the inmates?

Dr. ALEXANDER. Some of them become extremely experts; yes.

Senator LONG. Excuse me.

Dr. ALEXANDER. The most comprehensive programs at present are with the University of Kansas for Leavenworth; the University of Pennsylvania for Lewisburg; and Emory University Law School for Atlanta. There are several other small programs. Others are under discussion with major law schools. Our goal is to have such legal assistance available at all institutions.

We constantly receive letters or personal visits from inmates' families, attorneys, and other interested persons. We are fully responsive to such requests, explaining why the requests can or cannot be granted.

Mr. Chairman, as you know, the Bureau staff conducts regular visits, inspections, and audits at all our institutions. These range from the typical fiscal audits to inspections and studies of policy compliance. I am extremely proud of our career wardens and their associates who are a corps of administrators trained and developed since 1930 under the leadership of former Directors Sanford Bates and James V. Bennett. These career men and women are devoted to the policies and philosophy of correctional control and treatment of offenders. They are skilled administrators who have a high sense of public responsibility.

Mr. Chairman, I believe it would be helpful to this committee if it had available some of our policy statements involving inmate discipline, the prisoners' mailbox, access to legal material and counsel, and religious beliefs and practices. With your permission, I submit these statements for the record, or for the committee's use.

Senator LONG. Without objection, it will be placed in the record.

(Statements referred to follow:)

BUREAU OF PRISONS, WASHINGTON, D.C., POLICY STATEMENT—SUBJECT: PRISONERS MAILBOX

1. PURPOSE

To revise and describe the current procedures pertaining to the operation of the Prisoners Mail Box.

2. DIRECTIVE AFFECTED

Policy Statement 7300 2 (formerly Manual Bulletin No. 224) is hereby superseded.

3. PROCEDURES

a. *Purpose.*—The purpose of the Prisoners Mail Box (PMB) is to afford inmates in Bureau institutions an opportunity for candid discussion of problems with government officials not immediately responsible for their custody and discipline. All inmates may use the box to write to officials specified in paragraph b below, regarding any problem of importance which they believe cannot be solved through the assistance of institutional personnel or by utilizing regular mail channels.

b. *Officials to whom letters may be addressed through the Prisoners Mail Box.*—The President and the Vice President; the Attorney General; Director, Bureau of Prisons; Members of the Board of Parole; the Pardon Attorney; the Surgeon General, U.S. Public Health Service; the Secretary of the Army, Navy, Air Force; United States Courts; Members of the U.S. Senate and the House of Representatives.

c. *Alaska State Prisoners.*—Alaska state prisoners will be permitted to use the Prisoners Mail Box to write to state officials about their problems. Letters to the Governor, Attorney General, Commissioner of Health and Welfare, Director of the Youth and Adult Authority, and sentencing Judge will be forwarded without inspection to:

Director,
Youth and Adult Authority,
Pouch-H Health and Welfare Building,
Juneau, Alaska.

4. THE PRISONERS MAIL BOX

a. *Description.*—The Prisoners Mail Box should be placed in a conspicuous location or locations readily accessible to the inmate population. Arrangements should be made for the daily pickup of PMB letters from inmates who would ordinarily not have access to the principal box, for example, inmates in the hospital, in the admission unit, and in segregation.

Each box should be plainly marked, and above or on it should be posed a statement of its purpose a list of persons to whom mail may be sent, and a statement that matters which should be taken up with institution officials ordinarily will be returned to the institution for disposition.

The notice posed on each PMB shall also include the following statement: "The contents of all correspondence deposited in this box are the responsibility of the individual writer Any material which violates postal laws or regulations, i.e., is obscene or lewd or contains threats of bodily harm, involves extortion or libel, includes contraband, or is intended to facilitate escape from legal custody may result in prosecution in a federal court".

b. *Collections.*—A designated member of the institution staff shall collect the contents of each box *once* each working day, Monday through Friday. All PMB mail, except that addressed to U.S. Courts and to Members of Congress, shall be forwarded to the Bureau each day in an envelope plainly marked "Prisoners Mail Box."

c. *Identification of Mail.*—Inmates shall not be required to place any identifying information on the envelopes but shall be requested to address all envelopes as clearly and carefully as possible.

5. PROCESSING OF MAIL

a. *Letters to Central Office.*—Mail addressed to the Bureau of Prisons Central Office staff should be forwarded with other PMB letters addressed to the Director, but only the Director's name should appear on the notice posted above the PMB box.

b. *Letters to the U.S. Courts.*—All letters addressed to U.S. Courts shall be separated from other PMB correspondence and forwarded directly to the addressee without inspection but with an accompanying transmittal slip similar to the sample. Letters shall be forwarded to the addressees each working day in an institution envelope, and at government expense.

Mail addressed to U.S. Attorneys, U.S. Probation Officers, and Clerks of Court shall be forwarded to the addressee, but the notice posted above the PMB box shall be limited to U.S. Courts.

Legal documents such as petitions for writs of habeas corpus, motions to vacate, requests for trial records, etc. should be processed as special purpose correspondence as provided in Section X, "Special Purpose Letters", of Policy Statement 7300.1.

During admission-orientation, and regularly thereafter through other media of communication, all inmates shall be advised that their correspondence should be couched in decent respectful terms and present only those problems over which the court has jurisdiction and is known to have an interest.

c. *Letters to Members of Congress.*—All letters addressed to Members of Congress shall be separated from other PMB correspondence and forwarded directly to the addressee without inspection but with an accompanying transmittal slip similar to the sample. Letters shall be forwarded to the addressee each working day in an institution envelope, and at government expense.

Letters to Members of Congress shall be sent to their Washington address. In this connection each institution should obtain a current Congressional Directory for ready reference.

Letters addressed to persons you are unable to identify as Members of Congress, or which pose other unusual questions, may be forwarded to the Bureau together with other PMB mail for advice or disposition.

During admission-orientation and regularly thereafter through other communication media, inmates shall be advised that the PMB letters should be limited to the U.S. Congressman from the district in which the inmate has residence, or to the U. S. Senators from his state. Such letters must be couched in decent, respectful, and non-libelous terms and should confine themselves to problems with which these officials may be able to help him or in which they are known to have an interest.

Inmates should be instructed that letters to several Members of Congress about the same problem are likely to be less effective than will one letter to the Congressman of his choice. Follow-up letters ordinarily are unnecessary and certainly should not be resorted to in less than three or four weeks.

Letters to Members of Congress may be sent as "special purpose letters" if the inmate wishes.

6. REPLIES TO PMB MAIL

a. *From the Bureau of Prisons.*—All Bureau of Prisons replies to PMB letters will be addressed to the inmate. The original copies will be placed in an envelope marked "Mail Room" and will be forwarded to the institution each day. This procedure will result in the inmates receiving direct replies and will eliminate the necessity of caseworkers having to forward the individual replies on to the inmates.

Carbon copies of all replies for the institution will be forwarded under separate cover to be placed in the appropriate inmate's file. These replies should first be routed through the caseworkers for information purposes.

Should there be any serious questions about the propriety of sending a particular reply directly to the inmate, the letter will be addressed to the special attention of the Chief Executive Officer of the institution for appropriate disposition.

b. *From the Board of Parole.*—The U.S. Board of Parole will eventually adopt a similar policy, but until its present procedures for responding can be re-evaluated, some replies will continue to be directed to the Chief Executive Officer of the appropriate institution, in duplicate.

MYRL E. ALEXANDER,
Director, Bureau of Prisons,
Commissioner, Federal Prison Industries, Inc.

(Sample Transmittal Slip)

UNITED STATES PENITENTIARY, ATLANTA, GA. (DATE)

The attached letter was placed in our Prisoners Mail Box for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a problem over which this institution or the Bureau of Prisons has jurisdiction, you may wish to write to me or to the Director, Bureau of Prisons, Department of Justice, Washington, D.C. 20537.

If the writer encloses for forwarding correspondence addressed to another addressee, please return the enclosure to me, or the Director.—WARDEN.

(Sample)

Each institution shall duplicate a supply of these transmittal forms for its own use.

BUREAU OF PRISONS, WASHINGTON, D.C., POLICY MEMORANDUM—SUBJECT: RELIGIOUS BELIEFS AND PRACTICES OF INMATES

1. POLICY: FREEDOM OF RELIGIOUS BELIEFS AND PRACTICE

a. The objective of the Bureau of Prisons is to extend the greatest amount of freedom and opportunity in this area as is consonant with the total mission of the Bureau. This includes the requirements of maintaining security, safety, and orderly conditions in the institutions and of distributing available resources as wisely as possible among the many kinds of services and activities which contribute to these aims and to the purpose of rehabilitating offenders. To this end we have established these policies.

b. Chaplains employed by the Bureau are available to serve all inmates, assisting them to deepen and expand their knowledge, understanding and commitment to the beliefs and principles of the religion of their choice and to resolve such personal conflicts as they may have relative to religious beliefs.

c. Achieving these purposes may, and at times should, entail utilization of resources beyond those normally available within the institution, including clergymen or other representatives of churches in the community.

d. Staff, including part-time persons or volunteers who may be permitted to have contact with inmates, will never disparage an inmate's religious beliefs nor seek to persuade him to change his religious affiliation.

e. Except as provided below, inmates may attend any religious worship service conducted by an institutional chaplain unless there is some prior requirement on their time or unless his status does not permit him the freedom of the institution.

f. The chaplains should devote a reasonable portion of their funds to the procurement of a wide range of religious literature and should obtain free of cost suitable materials from all church groups of interest to members of the inmate body. Religious material should be made available to inmates who desire it—in both the chaplain and institutional libraries.

g. Where an inmate desires personal copies of certain books or a subscription to a religious periodical, he may arrange for this through the chaplain. Books and periodicals purchased for purposes of religious study or inspiration must meet the test of not being of such a nature as to injure the good order of the institution. Some material in this broad category is of an obviously inflammatory nature. Regardless of its effect on the individual who originally obtains it, its presence in the institution can be disruptive. Where the Warden is in doubt, he may seek the advice of the Bureau concerning particular publications.

h. An inmate will be permitted to retain for his use in the institution scriptural or devotional books appropriate to his faith. Also, books officially presenting the teachings or doctrines of a religious body shall be admitted into the institution. These books will be referred to the appropriate chaplain for review and delivery to the inmate.

i. Members of religious groups may also be permitted to have religious medals or comparable insignia provided that the wearing of such symbols does not create disciplinary or custodial problems or that they do not constitute what under usual rules of the institution may be defined as contraband.

2. REGULATION OF RELIGIOUS ACTIVITIES

In any society there is the likelihood of occasional or even frequent conflict between an individual's religion-inspired inclinations or obligations and his need to comply with requirements of civil authority. The problem is enlarged when he is an inmate of a total institution, and especially a prison. Although we wish to minimize such conflicts, there are constraints in the correctional setting that must be recognized, understood and accommodated. The following list is not exhaustive but should serve as a useful set of guidelines for local administrations.

a. *Freedom to change religious affiliations.*—We have set up a requirement (Para. IC above) that staff not seek to change an individual's religious affiliation. At the same time we require that individuals be assisted in their pursuit of religious knowledge and devotion. At times a chaplain will find it almost impossible to observe both dicta, because to provide an individual with requested instruction or counsel could encourage him along a course that will reseult in a change of religious affiliation. Granting the potential contradiction, the chaplain can partially resolve the conflict by encouraging an individual to defer his identifying with a new religious denomination (as by baptism, for example) so long as he is confined. Such enrollment can be taken care of after the inmate's release to the community by the prospective pastor. This policy could well be modified, of course, in the case of long-term prisoners, an individual who may be near death, or a situation where conversion to a particular religion would strengthen family ties or produce other desirable results.

Although the decision to change a religious affiliation is the responsibility of the inmate, it should be made with the advice and guidance of the chaplain. Each conversion should be recorded in the inmate file, and notification given to the Warden and the Supervising Chaplains, and, where appropriate to members of the immediate family. In cases of minors parental consent must be obtained.

b. *Attendance at religious services.*—The worship services led by the regular institutional chaplains usually meet religious needs of the inmates, The Protestant service is specially designed to be non-denominational in nature, and Catholic services are increasingly of a nature to meet the needs of persons of other faiths. In addition, special non-denominational services may be arranged on occasion, such as in connection with certain holidays, religious feast days, commemoration of some major public event, etc.

We recognize the fact that members of some religious faiths have special needs which cannot be met by the services of the institutional chaplain. For example, there are some Protestant denominations in which there are special requirements surrounding the administration of the Sacraments. Jewish inmates, members of the Church of Jesus Christ and the Latter Day Saints, Jehovah's Witnesses, and others also have special religious needs.

The chaplains are responsible for coordination of all religious services. When inmate request shows the need for such denominational activity, the chaplain may, with the approval of the Warden, provide contract coverage from the local community, or as suggested by the appropriate administrative office of the denomination involved. Such special denominational activities shall be scheduled at a time when the institution can provide adequate staff supervision. Services conducted by a regularly appointed chaplain, contract chaplain, or approved civilian religious leader shall be open to the general population, with consent of the religious leader involved. Where religious groups with special needs are without the services of a visiting clergyman, they may, on recommendation of the chaplain and with approval of the Warden, be permitted to meet for religious activities under supervision of a staff member. Inmate conducted religious activities are not open to the general population, but shall be limited to bona fide members of the group holding the service. Under no circumstances will members of a religious group be permitted to proselytize members within the institution population.

c. *Religious instruction.*—Chaplains should attempt to meet the needs of all inmates for religious education, but they may and should utilize the services of voluntary and contractual representatives of various denominations to supplement their own program. Participation in such instruction classes shall be ap-

proved by the chaplain in consultation with the denominational representatives. Classes will be limited to those inmates authorized to attend.

d. Reasonable limits must be placed on the accumulation by individuals of quantities of religious material. Where these limits are exceeded, inmates shall be given the option of donating the material to the institution or assuming the cost of shipping excess religious literature to an approved correspondent. If neither option is exercised, the material shall be confiscated.

e. The policy of augmenting usual religious services does not contemplate the admission of clergymen to conduct worship services except on invitation of the chaplains pursuant to the policies set forth above.

f. *Diet.*—Inmates should be given the option to abstain from eating those food items served to the general population which are prohibited by their religion. Ordinarily, the provision of special diets or the introduction into the institution of special foods or cooking utensils must give way to the practical problems of institutional administration.

Upon receipt of an inmate request, it shall be the responsibility of the institution, when qualified leadership is available, to provide opportunity for celebration of that ritual of sacramental nature necessary to meet at least minimal annual requirements imposed by bona fide membership in a given religious faith. For instance, for those of Jewish Faith, authority is granted to arrange for the observance of the annual Passover Seder. Sacramental elements, within limitations imposed by regulation, shall be obtained by the institution through funding for religious activities. Seder sacramental elements are defined as: grape juice, matzos, bitters, green vegetable, haroses, and the lamb bone.

8. MISCELLANEOUS

Religious and other greeting cards available through the office of the chaplains shall be distributed on a free and non-discriminatory basis; the lack of commissary funds shall not be a criterion for distribution. Mailing of these cards will be according to established institutional correspondence regulations. Postage of such cards will be according to normal institutional procedure; fees for postage shall not be taken from the chaplains' budget.

4. *This policy statement is cancelled upon inclusion in the inmate management manual.*

MYRL E. ALEXANDER,
Director, Bureau of Prisons,
Commissioner, Federal Prison Industries, Inc.

BUREAU OF PRISONS, WASHINGTON, D.C., POLICY STATEMENT—SUBJECT: INMATE DISCIPLINE

1. PURPOSE

The objectives of inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the programs, behavior standards and limitations imposed by the administration; and, (b) the general welfare of the institutional community.

2. EXPLANATION

While the foregoing statement of purpose has been basic to inmate management and control for many years, a reaffirmation of policy and standards at this time will serve as a basis for the formulation of more precise guidelines and evaluative procedures.

3. CANCELLATION

Policy Statement 7400.1 dated 9–9–66 is hereby cancelled.

4. POLICY

It is the policy of the Bureau of Prisons that inmates shall be subjected to disciplinary action only for the purposes expressed above and only in accordance with basic requirements listed below. This is in recognition that disciplinary sanction is but one factor in correctional treatment and control and that, as applied to an inmate who has misbehaved, the sole objective is his future voluntary acceptance of certain limitations which are being imposed upon him.

a. *Essential Principles.*—(1) Disciplinary action shall be taken only at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits.

(2) Inmate behavior must be controlled in a completely impersonal, impartial and consistent manner.

(3) Disciplinary action shall not be capricious nor in the nature of retaliation or revenge.

(4) Program assignments and changes are made to achieve treatment goals not as punishment or reward.

(5) Corporal punishment of any kind is strictly prohibited.

(6) The initiation of disciplinary measures against any inmate is the province only of the Adjustment Committee (a subcommittee of the classification committee) or, for minor infractions, as may be defined and delegated by the head of the institution and controlled by the Adjustment Committee.

(7) Disciplinary action shall be taken as soon after the occurrence of misconduct as circumstances permit.

(8) Inmate case records shall reflect misconducts, dispositions and shall include interpretive and evaluative statements regarding them.

b. *Administration of Discipline.*—It is the responsibility of the head of the institution to prepare and promulgate clear Policy Statements for the guidance of institutional staff in handling disciplinary matters. Such Policy Statements shall reflect that primary responsibility for the disciplinary program rests with the Classification Committee. The statement shall also require that every reported misconduct be investigated and referred as prescribed. Top management retains continuing responsibility for consistency in the administration of discipline and for evaluating the results achieved.

c. *Use of Segregation.*—Inmates shall be segregated only for the purpose of insuring immediate control and supervision when it is determined that they constitute a threat to themselves, to others, or the safety and security of the institution, and only in accordance with the principles and guidelines expressed in Appendix A, attached.

d. *Forefeiture and Withholding of Good Time.*—The forfeiture, withholding and restoration of good time shall be accomplished in accordance with a Policy Statement on this subject soon to be issued.

e. *Transfers for Adjustment Reasons.*—Transfers for adjustment reasons may be considered, either as an aid to the adjustment of individual inmates or in the best interests of the institution community, in accordance with the guidelines expressed in Appendix A, attached.

f. *Referrals for Prosecution.*—Whenever inmate misconduct violates Federal statutes, the head of the institution shall immediately convey the facts to the appropriate Federal investigative agency and United States Attorney, as prescribed in the revised Custodial Manual.

5. IMPLEMENTATION

Institutional Policy Statements relating to inmate discipline shall be prepared in accordance with this Policy Statement and the guidelines expressed in Appendix A, attached. All such statements shall be submitted to the Director for approval.

MYRL E. ALEXANDER,
Director, Bureau of Prisons,
Commissioner, Federal Prison Industries, Inc.

SUBJECT. IMPLEMENTATION OF POLICY RELATING TO INMATE DISCIPLINE

1. ADJUSTMENT COMMITTEE

Basic authority for the administration of inmate discipline shall be delegated by the head of each institution to an adjustment committee and/or Treatment Team of the Classification Committee. The Committee shall consist of at least three members of the Classification Committee whose selection places this important responsibility in the hands of personnel who are most competent and who broadly represent the primary areas of correctional treatment. (One of the members shall represent the correctional service). Such delegation shall be accompanied by a specific charge which outlines duties and responsibilities in accordance with the following:

a. *Functions.*—The Adjustment Committee and/or Treatment Team functions as a sub-committee of the Classification Committee. In addition to receiving reports of misconduct, conducting hearings, making findings, and imposing disciplinary actions, the Adjustment Committee makes direct referral for diagnosis or special handling, makes indicated program changes and otherwise has authoritative concern over institutional policies and operating procedures which affect discipline. It is also concerned with evaluating the effectiveness of its decisions and other factors which have a bearing upon inmate discipline and morale.

b. *Dispositions.*—The Adjustment Committee and/or Treatment Team has access to a broad range of dispositional alternatives, included are direct referral to various institutional program and service resources, reprimand, restrictions of various kinds, segregation and recommending the withholding or forfeiture of good time. Consistent with the Policy Statement objectives of discipline, the choice of alternatives is a composite group judgment which takes cognizance of the reasons for the adverse behavior, the setting and circumstances in which it occurred, the involved inmate's accountability and the correctional program goals set for him. The choice of disposition goes far beyond mere compliance with regulations. To be fully effective, the inmate must understand and accept the reasonableness of the limitations being imposed upon him. A system should be devised to provide follow-up of at least the more serious and persistent behavior problems dealt with.

2. USE OF SEGREGATION

In most institutions there is a separate housing unit for inmates who, at times, need to be segregated from the regular population. This unit is to be designated the Segregation Unit. In keeping with Policy Statement purpose, the Segregation Unit shall be operated in accordance with the following basic requirements of control and supervision.

a. *Segregation Conditions.*—The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times.

b. *Cell Occupancy.*—Except in emergencies, the number of inmates confined to each cell or room shall not exceed the number for which the space was designed. Whenever an emergency arises which indicates that excess occupancy may be temporarily needed, an immediate report shall be made to the head of the institution and his approval obtained.

c. *Clothing and Bedding.*—All inmates shall be admitted to segregation (after thorough search for contraband) dressed in normal institution clothing and shall be furnished a mattress and bedding. In no circumstances shall an inmate be segregated without clothing except when prescribed by the Chief Medical Officer for medical or psychiatric reasons. If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding a medical officer shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the medical officer.

d. *Food.*—As prescribed in existing regulations, segregated inmates shall be fed three times a day on the standard ration and menu of the day for the institution.

e. *Personal Hygiene.*—Segregated inmates shall have the same opportunities to maintain the level of personal hygiene available to all other inmates, e.g., toilet tissue, wash basin, shaving, tooth brushing, comb, eye glasses, etc.

f. *Duration of Segregation.*—Consistent with the need for segregation, no inmate shall be segregated longer than necessary. Special care must be taken that segregation does not become a haven for those who persistently fail to face their problems. The adjustment committee is responsible for the program needs of inmates who require or demand long-term segregation. They will conduct a formal review of such cases at least once each month and their recommendations will be brought to the attention of the head of the institution.

g. *Supervision.*—In addition to the direct supervision afforded by the unit officer, each segregated inmate shall be seen daily by a physician or medical technician, and one or more other responsible officers designated in the local policy issuance.

h. *Correspondence and Visits.*—In the absence of direct and compelling reasons to the contrary, inmates in segregation shall not be required to forfeit correspondence and visiting privileges. (Note that this supersedes the provisions of paragraph IX of Policy Statement No. 7300.1 and is in keeping with paragraph D7c. of Policy Statement No. 7300.4).

1. *Records.*—A permanent log will be maintained in the segregation unit. All admissions will be recorded indicating date, reason for admission, and the authorizing official. All releases from the unit will be similarly recorded. Officials required to visit the unit will sign the log giving time and date of visit. Unusual activity or behavior of individual inmates will be recorded in the log with a follow-up memorandum through the head of the institution for the inmate's file.

3. TRANSFERS FOR ADJUSTMENT REASONS

Whenever, in the opinion of the Adjustment Committee and/or Treatment Team, transfers to a more appropriate institution or facility is indicated, a complete progress report shall be prepared and shall describe the inmate's status in all phases of his program. In recommending or effecting such transfers, particular care shall be taken that (a) the inmate is not manipulating his situation by becoming a serious management problem, and (b) the staff has exhausted every reasonable local resource before transfer is considered.

BUREAU OF PRISONS, WASHINGTON, D.C., POLICY STATEMENT—SUBJECT: ACCESS TO LEGAL REFERENCE MATERIALS AND LEGAL COUNSEL AND PREPARATION OF LEGAL DOCUMENTS

1. POLICY

It is the intent of the Bureau to afford inmates reasonable access to legal materials, legal counsel and a reasonable opportunity to prepare their legal documents. The inmates program will continue without undue disruption by legal activities except in those instances where inmates are confronted with imminent deadlines established by the court in which the inmates lawsuits are pending. The purpose of this Policy Statement is to set forth the policies to be applied throughout our system. In certain instances the Policy Statement is purposely general to enable individual institutions, within these guidelines, to promulgate local rules and regulations which are most appropriate to their needs. Manual Bulletin No. 47, dated February 16, 1943, is accordingly rescinded.

All institutions are to submit copies of their regulations which implement this Policy Statement within 60 days from this date.

2. PROVISION FOR LEGAL RESEARCH MATERIALS BY THE INSTITUTION

a. While there appears to be no present legal requirement for the institution to provide law books for inmates, it is appropriate and equitable that we provide some of the basic legal reference materials which are most apt to assist the inmates needs. Lack of uniformity and large accumulations of irrelevant and meaningless materials have resulted from the application of Manual Bulletin No. 47.

b. In order to foster uniformity, as far as practical, provide meaningful resource materials, and avoid stockpiles of material of dubious value, all institutions are to provide copies of each of the following:

(1) The 7 volumes of Title 18, United States Code Annotated (Criminal Code and Criminal Procedure).

(2) Title 28, United States Code Annotated §§ 2241–2280 (Habeas Corpus and Motions to Vacate Sentences).

(3) Title 21, United States Code Annotated (Food and Drug).

(4) Title 26, United States Code Annotated §§ 4001–5600, and 7501 to end (Narcotics Offenses).

(5) A recognized law dictionary, such as Blacks Law Dictionary by West Publishing Company.

Three sets of United States Code Annotated should be sufficient for the major penitentiaries and the Medical Center. Other institutions should have sufficient numbers as are required by their needs. The United States Code Annotated should be kept current by obtaining the pocket parts each year from the West Publishing Company.

3. PURCHASE AND DISPOSAL OF LAW BOOKS AND OTHER LEGAL MATERIALS BY INMATES

a. If the inmate has the financial means to purchase a law book, he shall be allowed to do so unless there is a compelling reason to the contrary. It is inappropriate for an administrator to make the determination that the specific ma-

terial sought by an inmate is not relevant to his case and the refusal to allow the inmate to obtain such materials may well result in an adverse judicial decision or censure. If there appears to be clear and compelling reasons to disallow a purchase, the Legal Counsel should be advised before a final determination of the matter is made.

b. Law books and other materials are to be purchased only from the primary sources of supply, i.e. the published of law books; the clerk of court and/or a judge of the court in the case of court documents.

c. Since the institutions will be maintaining the basic reference books there should be no need to accumulate all books purchased by inmates. An inmate may donate a particular book to the library when he is finished with it, if he wishes to do so and the institution agrees to accept the offer. The physical facilities of the institution and the nature of the book are appropriate factors to be considered. i.e. whether additional books can be readily accommodated and whether the book is broad in applicabilty. In the event a book is not to be acquired, it should be sent home or destroyed, whichever the inmate prefers.

d. The present accumulation of obsolete and irrelevant materials may be disposed of but case reports (Federal Supplement; Federal Reporter; United States Reports) already in the library should be retained. Further accession of these reporters should be made only by mutual agreement as indicated above.

4. PREPARATION OF LEGAL MATERIALS BY INMATES

a. Inmates should be allowed to have a reasonable amount of time to prepare their documents. Of course, what is reasonable depends upon the individual circumstances. Inmates who are required to meet deadlines in connection with pending litigation in general should be given more latitude than those who are preparing to institute suit and are not required to file within a given period. Documents presented for submission to the courts should always be forwarded. If they are threatening or indecent, a special cover letter should accompany the document explaining Bureau policy and relevant background factors and data.

b. Inmates in administrative segregation status should, as far as possible, be given the opportunity to work on their legal matters and have access to legal reference materials equal to those persons in general population. In view of the very short duration which inmates are normally kept in punitive segregation, the aforementioned policy should apply only if such inmates are in the midst of litigation and where the time element is such that it is important to allow them to continue to work on their cases. If, however, an inmate remains in punitive segregation beyond the normal period, the policy relating to administrative segregation should be applicable to him as far as possible.

c. Physical facilities provided for legal research and study will depend upon the facilities available in a particular institution. While a separate room is more desirable, the physical and staff limitations and the number of inmates using legal materials could well indicate the advisability of using other facilities.

d. Preparation of legal documents in living quarters during "off duty" hours may be authorized. Factors which might preclude such arrangements could inculde the individuals involved or the peculiar housing accommodiations.

5. USE OF TYPEWRITERS

a. The advantage of submitting typewritten documents is well established. Thus, unless it is demonstrated that the use of typewriters is not feasible in a particular institution, their use should be allowed either through inmate clerks to whom handwritten documents are submitted by the individual inmates or typed individually, or submitted to public stenographers, whichever procedure is in accordance with institution policy.

b. If there is to be a delay in having documents typed, the inmate should be so advised, and he may transmit handwritten papers to the court.

6. RETENTION OF ATTORNEYS

a. Inmates should be allowed to contact attorneys for the purpose of representing them. They should not, however, send out several requests simultaneously but should make their requests one at a time.

b. While it is permissible to advise an attorney of the funds which the inmate has available, and it is many times desirable to counsel with the inmate, if the inmate has attained his majority and is mentally competent to handle his own

affairs, we are not to interfere with the financial arrangement between attorney and client neither are we to act as a guarantor or collector of the fees. The payment of retained attorney's fees is a matter between attorney and client. Administrative Form 6 is hereby discontinued.

c. Visits by attorneys of record are not to be subject to auditory supervision. Correspondence between attorney of record and client may be opened, but for the sole purpose of inspection for improper content. Matters which relate to legal advice or concern pending or prospective litigation, included in such correspondence, are to be kept in strict confidence by the inspecting official.

MYRL E. ALEXANDER,
Director, Bureau of Prisons,
Commissioner, Federal Prison Industries, Inc.

Dr. ALEXANDER. Finally, Mr. Chairman, I appreciate this opportunity to make known to the committee my views on our policies and practices which are designed to assure full communication between the men and women in our institutions and responsible officials of Government.

The use of ombudsmen in Government is beyond my experience as a prison administrator and my personal judgment of the ombudsman principle must be deferred until it has been fully explored Government-wide or by persons more competent than I. In the meantime, I firmly believe that we have provided a responsible and effective means for Federal prisoners to communicate any complaints, requests, or wishes to the responsible officials of their Government and the courts.

Thank you, Mr. Chairman.

Senator LONG. Thank you, Dr. Alexander.

Mr. Kass?

Mr. KASS. Thank you, Mr. Chairman.

Dr. Alexander, in listening to the discussion of the Veterans' Administration, I assume you couldn't set up the telephone-type systems in the Bureau of Prisons as we could with the VA?

Dr. ALEXANDER. I agree. It would severely breach institutional security, Mr. Kass.

Mr. KASS. I see.

Professor Gellhorn who has written a book called "When Americans Complain," and has done a lot of study in the area of ombudsmen at both the Federal, State, and local level, has made the following statement which I will paraphrase; that the prisoners, as he says, are deluded—and talking both at the Federal, State, and local level—if they suppose that complaints are investigated without local awareness that they have been made, implying that the complaints at all levels, whether from Congress or the President or others, are ultimately sent back to your agency for review. He makes the point, therefore, that there is no real external review of the prisoners' complaints.

Would you care to comment on this in light of this which is, in effect, the supplemental remedy that Mr. Hamilton referred to, of the ombudsman.

Dr. ALEXANDER. First of all, a majority of, or a very substantial number of, the complaints are legal complaints. These involve procedures of investigative agencies, or legality of sentences, the construction of sentence the way time is computed, and the like. These are all matters of fact or record. They are reviewed, each and every one,

by our legal staff, and where there is some aspect of the complaint that is open to question, it is completely investigated by our legal office. The inmate is then supplied with a statement as to why or why not the request cannot be granted. I happen to have given one example of a case on construction of sentence which could be done.

In cases where we have an unusual complaint, it is our practice to send someone from the central office. In two recent instances in the past year, I have had a disinterested person actually retained to go to an institution to check out complaints on which I did not want to be in the position of conducting a self-investigation.

There are many other kinds of complaints; for example, those involving injury compensation for a minor injury of some kind. We follow the standards and the principles of the National Safety Council. Our hospitals which are administered by the U.S. Public Health Service are regularly inspected. Incidentally, included in the prisoner's mail box addressees are letters to the Surgeon General, U.S. Public Health Service, on any complaints such as medical practices or lack of sanitation.

What I am saying is that as conscientiously as possible, we answer, follow every complaint, give a written response to every prisoner's mail box letter that comes to us; that is, those directed to me as a Director of the Bureau of Prisons or one of our staff.

Now, as the chairman knows, this sometimes initiates correspondence back and forth. We don't have a person who acts in a capacity similar to the contact representative of the Veterans' Administration. However, each inmate in our institution is assigned to a trained counselor or caseworker, and each complaint that he has is handled by this caseworker. We have now the established practice in our institutions that the inmate doesn't even have to put in an interview request and wait 2 or 3 days to be called up. Either at the noon or evening meals these staff people are available to any man from the institution going or coming from the dining hall. In some of our youth institutions we now put such a person right into the cellhouse or the dormitory. We have tried to provide, within our system, both an immediate opportunity to register his complaints within the institution and access to the highest levels of Government.

Mr. KASS. The structures that you referred to within the institution are, of course, commendable and do work in many instances. I am thinking of the instance you raised of prisoners complaining about the quality of food.

If, for example, the quality of the food is good, and one of the food inspectors goes to the prison, inspects the food and then comes back and says the food is good; maybe this is the steam-valve approach we talked about; but isn't there a utility for the external type of review so that the prisoner will know that not only did the Bureau of Prisons say the food is good, but also this ombudsman, or call him "grievance man," has told him the same thing.

Dr. ALEXANDER. Any system or device which would help us manage these highly volatile prisons and institutions and provide an outlet for, many times, these rather emotionally disturbed persons, can be no serious problem to us. Indeed, all of these procedures I described are designed for that purpose. My principal concern is that we not provide so many avenues and channels of communication that too many people

get involved so that the inmates spend all of their time voicing their complaints and there is a great deal of duplication. I certainly think we have demonstrated through the years that we are anxious to provide proper outlets and competent evaluation of the complaints.

Mr. KASS. This will be actually a statement more than a question. Professor Gellhorn, also in reference to State and local governments primarily, makes the statement, and I quote "nowhere is the need for external examination of grievances greater than American prisons, jails, and other places of detention." Would you care to comment on this more toward the question of State and local?

Dr. ALEXANDER. That is a very sweeping question since it is covered in terms of all jails or prisons in the United States. There are some 3,200 county jails, some 285 major prisons, and untold numbers of detention homes, police lockups, and city workhouses throughout the country. I can only suggest that by our practice, I hope it is clear that I endorse full communication and opportunity for any person held in confinement to enable him to make known whatever his problems may be.

Mr. KASS. And in S. 1195, section 8b says "any letter addressed to the ombudsmen and written by any person in custody on a charge of or after conviction of any offense in the United States shall be immediately forwarded to the ombudsmen from the institution where the writer of the letter is detained." This would not conflict with your present intention?

Dr. ALEXANDER. This is precisely the method we use with Members of Congress and with the courts at present.

Mr. KASS. But would there be a harm in giving it to an additional person who would be able to investigate it?

Dr. ALEXANDER. No; my response suggests that if there is an ombudsman, I would subscribe to that procedure of communicating with him because wherever there is a responsible person in government we follow that practice now.

Mr. KASS. Although you seem to suggest in your statement there is some merit to it, I think that maybe you don't want too many people sticking their fingers into the prison pot so that the prisoners will have constant correspondence, and maybe are deluded in thinking they are going to get assistance when they are not.

Dr. ALEXANDER. I think it is important that those with whom they communicate be responsible officials of government. If the Office of Ombudsman is created, the ombudsman no doubt would be a responsible official of government and would be included in this pattern of communications which we presently follow.

Now, we do not, for example, permit an inmate of a Federal institution to write to the chief food inspector of some far-off State, and many times, they will want to do this. We believe that since they are Federal prisoners, they should communicate with responsible officials of the Federal Government, the Federal courts, or those persons who are responsible. You see, 20,000 inmates sitting around talking in the yard at night can concoct all kinds of ideas, and they might decide that the president of the National Football League really ought to know about the fact that we don't play contact football. If one such case came up, we probably would say, "Well, write the letter." How-

ever, to open the door to widespread, unlimited kind of correspondence would be inconsistent with our general pattern.

As I said before, if there is a Federal ombudsman, he should be able to communicate with inmates the same as the other officials I mentioned before.

Mr. KASS. And the system would give him full access to the prisoners' records?

Dr. ALEXANDER. Oh, yes. Well, this is true right now of those with whom they correspond.

Mr. KASS. Does the prisoner have full access to his records?

Dr. ALEXANDER. No, sir.

Mr. KASS. Does he have limited access; does he have any access?

Dr. ALEXANDER. He may have access to certain information which he wants to know, but he has no access directly to his file nor can he handle it. These files contain investigative reports, reports by judges, probation officers, confidential psychiatric records, and so on.

Mr. KASS. Thank you. I have no further questions.

Senator LONG. Mr. Waters?

Mr. WATERS. Doctor, I note that you list several people to whom the prisoners have direct communications, among them Congressmen and Senators, and certainly we know that the Congressmen and Senators do get a lot of mail. I didn't see lawyers on there. But I assume they are also permitted free access to lawyers?

Dr. ALEXANDER. Yes; to their attorney of record. This applies not only to correspondence, but also to confidential visits.

Mr. WATERS. Thank you.

Dr. ALEXANDER. But the prisoners' mailboxes which I was describing is not used for that purpose.

Mr. WATERS. Thank you.

Senator LONG. Doctor, do you notice a possible resentment among the prisoners against the system that is presently in force that they are having to communicate with people who investigate, people who are actually making the complaint against them? Is there some reason meant on that basis? Would they feel freer by writing the letter to the ombudsman and having him look at it rather than your legal department which is an employee of the group that they are complaining against?

Dr. ALEXANDER. I have had no feedback on that that would suggest that there is complaint against the system of making complaint.

Did you have something?

Mr. BARKIN. If I could point out one illustration, the legal aid program we have encompasses civil as well as criminal remedies, including complaints against the administrators. Our experience has been, especially with Leavenworth, which has been in existence longer than any other, that there is a very small number of complaints leveled against the administrator but they are free to make such complaints. As a matter of fact, we encourage this. We indicate that if there is a complaint against the administrator, the institution should bend over backward not to interfere, because in such cases there could be a ground for alleging that we have an interest in the complaint. The experience is pretty much that way. The legal aid program has this concept in mind—that once a law school program gets started, the Bureau of Prisons bows out completely other than providing the legal aid pro-

gram with the necessary information. The prisoners do not go through us in any way. We don't talk to them, and the students are treated in every respect like counsel.

Senator LONG. That is really the ombudsman theory?

Dr. ALEXANDER. That is right.

Senator LONG. Along that line.

Dr. ALEXANDER. That is right.

Senator LONG. I have visited the institutions over the years and have been very impressed with the cordial relationships between the warden and prisoners. There appear to be very few feelings of resentment against the wardens. When I am on the vists, I always have been available and have talked to quite a number of them. I recall over the years that I have had one prisoner who has been critical of the warden or institution—only one, the "Bird Man"—that was a rather unusual exception, so I don't believe there is actually too much resentment all culminated in the theory of the ombudsman we are talking about.

Any other questions?

Dr. ALEXANDER. Well, in the sense, Mr. Chairman, of providing unrestrained and uninhibited communication, we have certainly tried to follow that principle.

Senator LONG. I doubt very much that you should permit unlimited correspondence and communication with the outside.

Mr. Fensterwald?

Mr. FENSTERWALD. Doctor, I would like to ask whether the independent investigatory power of an ombudsman would cause any difficulty? I understand the part about free access to Federal officials, but most of the Federal officials that the prisoner can communicate with, such as a Senator or Congressman, don't have any power to investigate. What they do is turn the complaint back over to you. Would it cause any trouble if an ombudsman or a representative of an ombudsman would have access to prison officials and physically have access to the prisoner imprisoned to investigate a complaint?

Dr. ALEXANDER. I don't see that it would cause any more problem than a staff member of the General Accounting Office coming right into our institution for an investigation or an FBI investigation a U.S. attorney's inquiry on a complaint of some sort. These types of investigations now regularly take place.

As a matter of fact, in prison administration we are quite accustomed to numbers of other agencies coming to the institution. I must confess that sometimes we think they are attracted to the prison because its kind of a unique, isolated sort of place that they are interested in. But in direct response to your question, assuming that he were a person of good judgment and circumspect in his work, I would see no problem.

Mr. FENSTERWALD. Thank you.

Senator LONG. Thank you, Doctor. Thank you, sir. We appreciate both of you being here. You have been very helpful to the committee.

The committee will stand in recess until 10 o'clock tomorrow morning, at which time we will meet in this room for a hearing on another subject.

(Whereupon, at 12:05 p.m., the hearing was recessed until 10 a.m., Wednesday, January 17, 1968.)

APPENDIX

(Views of Bureau of Prisons can be found beginning on p. 35 of this volume under testimony given by Dr. Myrl E. Alexander.)

AGENCY COMMENTS ON S. 1195

INTERNAL REVENUE SERVICE,
THE GENERAL COUNCIL OF THE TREASURY,
Washington, D.C., November 15, 1967.

HON. JAMES A. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1195, "To establish the Office of Administrative Ombudsman to investigate adminstrative practices and procedures of selected agencies of the United States."

The bill would create an Office of Administrative Ombudsman which would be independent of the executive department and under the direction and control of the Administrative Conference. The Ombudsman would be appointed by the President for a term of five years and could not hold the office for more than four full terms. The Ombudsman would have the authority to investigate, whether on his own motion or upon a complaint, the administrative acts, practices, or procedures of the Internal Revenue Service, the Social Security Administration, the Veterans Administration, and the Bureau of Prisons and of their officers, employees or members.

The Ombudsman would be required to investigate, under sections 4 and 5 of the bill, administrative acts which might be contrary to law or regulation, unfair, unreasonable, oppressive, based on a mistake whether of law or fact, based on "improper or irrelevant grounds", "unaccompanied by an adequate statement of reasons", inefficiently performed or "otherwise erroneous", unless he decides that there is already an adequate remedy for the complaint, or the matter is outside his jurisdiction, is trivial, frivolous, vexatious, not made in good faith, or the complaint does not have a sufficient personal interest in the matter or has had knowledge of the matter too long before complaining about it. If the Ombudsman decided to investigate, he would so inform the complainant, if any, and the agency concerned. On-the-spot investigations of agency proceedings and activities would not be prohibited. In investigations, the Ombudsman could make inquiries of the agencies and hold private hearings with "both the complaining individual and agency officials", to find an appropriate remedy with respect to the matter complained of, or to make routine checks of the operations of any agency under his jurisdiction.

Section 6 of the bill would provide for the Ombudsman's course of action in dealing with an agency. If the Ombudsman's investigation were to convince him that a matter should be considered further by an agency, or an administrative act should be modified or canceled, or the governing statute or regulation should be changed or repealed, or reasons should be given for an administrative act, or some other action should be taken by the agency concerned, the Ombudsman first would consult with the agency about which, or the person about whom, he is planning a critical report or recommendation and then would allow a reasonable time either for compliance with his recommendation or for the filing of an explanation of the administrative act. When he had prepared his final views or recommendations, he would submit them to the agency and could then request that he be notified within a specified time of what action the agency had taken on his recommendations. The agency would be required to respond to the request. Thereafter, within 60 days of sending his views or recommendations to the agency, the Ombudsman would send copies, together with the agency's reply, to the head of the agency concerned, the Chairman of the Administrative

Conference of the United States, and the appropriate Congressional Committees, and would take any other action to make such information available to the public. Finally, the Ombudsman would notify the complainant as to the fate of his complaint.

Section 8 of the bill would provide that no proceeding, report or decision of the Ombudsman which was conducted or made in accordance with the provisions of the bill could be "challenged, reviewed, quashed, or called into question in any court." Furthermore, no civil or criminal action could be brought against the Ombudsman or his staff for anything they might do in a good faith discharge of their duties under the bill nor could the Ombudsman be required to give testimony in any court or in any judicial "investigation of his functions."

In addition, section 8 would provide that the authority of the Ombudsman to act would be in addition to any other remedy available to a complainant and that any other such remedy would continue to be available. The authority of the Ombudsman could be exercised notwithstanding any other provision of law providing for the finality of any administrative act.

The author, when he introduced the bill, stated that the proposed Ombudsman is intended to be "a combination red-tape cutter, complaint bureau, and citizen's defender against bureaucracy" with "broad investigatory powers". According to the author, the Ombudsman would, in effect, "be an arm of the Congress, similar to the General Accounting Office which primarily handles fiscal matters, and similar to the other Ombudsmen of the world who are responsible to their parliaments." (113 Cong. Rec. S3201)

It is difficult to assess the probable impact of the bill on the work of the Internal Revenue Service of this Department since te ombudsman concept is not analogous to anything in American administrative experience. However, after consideration of the provisions of the bill and after a review of the available literature in English on the institution of the ombudsman, it is the view of the Treasury Department that enactment of the bill would not achieve the ends sought by its sponsor, that is, providing citizens with a forum for complaints about administrative acts. Furthermore, it could seriously impede the administration of the Internal Revenue Code without contributing noticeably to the greater well-being of allegedly aggrieved taxpayers. We believe that adequate remedies for such taxpayers to pursue and adequate procedures for investigating the administration of the Federal tax laws without seriously impeding the administration of such laws presently exist.

The institution of the ombudsman has existed in more or less its present form since provision for it was made in the Swedish constitution of 1809. The office of the ombudsman has been incorporated into the administrative framework of several other small countries in this century, several making the addition in the years since the second World War. In contrast to the United States, the countries adopting the institution of the ombudsman have been small countries governed by the parliamentary system where governmental bureaucracy is responsible to the parliamentary majority. It is noted that the Ombudsman for Denmark has hesitated to recommend that a country as large as Great Britain adopt the institution. Confining the operations of the ombudsman proposed in the bill to four Federal agencies does not meet the objection to the ombudsman based on the size of a country. The Internal Revenue Service alone is responsible for the collection of Federal taxes with respect to 190 million people throughout fifty States and territories.

It is urged by the proponents of the ombudsman, and the point was made by the author of the bill in his introductory remarks, that the institution works best in those countries having the best developed and most honest administrative systems. While this is true, it does not follow that the highly technical and sophisticated system of law found at the Federal level in the United States lends itself to overseeing by an ombudsman. In the November 1965 Yale Law Journal, Professor Walter Gellhorn points out that Sweden, in 1909, created a Supreme Administrative Court to which certain classes of cases, preponderantly those involving taxation, now go. Professor Gellhorn concludes:

* * * the administration of social insurance and related 'welfare state' activities was not a dominant element of the Ombudsman's caseload, *nor were taxation disputes a major feature of his concern.* These observations concerning the Ombudsman's work are emphasized here because both Swedish and foreign commentators have sometimes stressed that the Ombudsman system is especially needed in societies with elaborate social welfare and tax administration. The available figures suggest, on the contrary, that the Ombudsman plays a minor part in resolving the undoubtedly numerous controversies that arise between citizens and

officials in these fields. Those controversies are dealt with by other means, especially designed for the purpose." (Emphasis added)

The Congress, through the Joint Committee on Internal Revenue Taxation, already conducts a continuing and detailed examination of the Internal Revenue Service's discharge of its duties under the Internal Revenue Code. Sections 8001 through 8023 of the Internal Revenue Code set forth the powers and duties of the Joint Committee relevant to its continuing supervision of the Service and the development of the Code. These provisions in many respects parallel those which would be conferred upon the Ombudsman. Section 8022 confers broad powers of investigation upon the Joint Committee. Section 8022 provides:

"It shall be the duty of the Joint Committee—

(1) INVESTIGATION.—

(A) OPERATION AND EFFECTS OF LAW.—To investigate the operation and effects of the Federal system of internal revenue taxes;

(B) ADMINISTRATION.—To investigate the administration of such taxes by the Internal Revenue Service or any executive department, establishment, or agency charged with their administration; and

(C) OTHER INVESTIGATIONS.—To make such other investigations in respect of such system of taxes as the Joint Committee may deem necessary.

(2) SIMPLICATION OF LAW.—

(A) INVESTIGATION OF METHODS.—To investigate measures and methods for the simplification of such taxes, particularly the income tax; and

(B) PUBLICATION OF PROPOSALS.—To publish, from time to time, for public examination and analysis, proposed measures and methods for the simplification of such taxes.

(3) REPORTS.—To report, from time to time, to the Committee on Finance and the Committee on Ways and Means, and, in its discretion, to the Senate or the House of Representatives, or both, the results of its investigations, together with such recommendations as it may deem advisable."

Under section 8021, the Joint Committee may hold hearings with sworn testimony where and when it wishes and may compel attendance of witnesses and the production of books, papers and documents. In addition, the Joint Committee is authorized by section 8023 to obtain, whether from the Internal Revenue Service or any other agency, information, suggestions, rulings, and other relevant data for the purposes of the Joint Committee.

Dr. Laurence Woodworth, Chief of Staff of the Joint Committee on Internal Revenue Taxation, has briefly described the continuing function of that Committee in its supervision of the Internal Revenue Service:

"* * * the Joint Committee meets to review administrative problems arising under the internal revenue laws. These may involve a review of administrative procedures in the Internal Revenue Service or, perhaps, review of some proposed ruling or regulation brought to its attention by the Service with respect to which a particular problem exists. In addition, the Joint Committee, from time to time, of its own volition raises questions as to an administrative procedure or proposed or final ruling or regulation. The Joint Committee, on occasion, has made recommendations with respect to legislation, but has not done so on any regular, or frequent bases." ("Enacting Tax Legislation", 18th Tax Institute, University of Southern California Law Center (1966) p. 23)

Furthermore, the Joint Committee, together with the House Committee on Ways and Means and the Senate Finance Committee, has much greater access to tax returns than any other Federal establishment. The effect is that the Joint Committee, with its expert staff, is permanently in session on matters of tax administration. The ombudsman could only duplicate the work of the Joint Committee and with less staff and less expertise than is enjoyed by the Joint Committee and with less responsibility for the results of his intervention than is borne by the Joint Committee.

The Internal Revenue Code of 1954, as amended, is a complex and technical statute. An especially qualified Tax Court hears cases with respect to contested tax deficiencies and the United States District Courts and the United States Court of Claims hears cases with respect to refund suits. Appeals are heard by the United States Courts of Appeals or, in some cases, by the United States Supreme Court. The Ways and Means and Finance Committees carry on a review of the operations of the Internal Revenue Service and its interpretation of the Code. Members of the teaching profession and professional organizations also provide a close and continuing review of Internal Revenue Service activities through law

journals, bar groups, and annual tax conferences. Students of the Internal Revenue Code will agree that, in many difficult and complex areas of the Code, there is not always uniformity of agreement in the interpretation of Code provisions.

An Ombudsman cannot be expected, or even be permitted, to supply the one proper interpretation of either the substantive or procedural provisions of the Code. It is the responsibility of the Internal Revenue Service to administer the tax laws fairly, promptly, and uniformly. The rulings and determinations of the Service are applicable to taxpayers throughout the country in contrast, for example, to the jurisdiction of the several United States Courts of Appeal, whose decisions are binding only on the courts within their respective circuits. Within this context, the question of accepting an adverse decision by the Tax Court, a district court, the Court of Claims, or one or more circuit courts of appeal involves, necessarily, a determination that the litigation has resulted in a rule reasonably consistent with the intent of Congress, that it is one likely to be acceptable to all taxpayers similarly situated and to other courts in which the question may arise, and is thus one calculated to make for certainty and uniformity among taxpayers.

A rule which benefits one taxpayer may be harmful to others or may establish a precedent which is inconsistent with the broad scheme of the statute. Moreover, it is not uncommon for appellate courts to disagree as to the proper interpretation of the tax laws, with some courts upholding the position of the Internal Revenue Service and others rendering adverse decisions on the same question. In general, under firmly established policy, adverse decisions by two circuits (or one circuit and the Court of Claims) are deemed an adequate test of the Internal Revenue Service's position, although, frequently, the Service's position, once it has been fairly tested and rejected by even a single court of appeals or even, in some cases, a district court, will be conformed to such adverse decision, provided it lays down a rule capable of fair and equitable administration on a nation-wide basis. Except for constitutional questions, there is no right of appeal to the United States Supreme Court. Jurisdiction to review, by writ of certiorari, lower court determinations of tax questions is rarely sought or granted except where there is a genuine, positive conflict in the circuits, including the Court of Claims, or where a lower court determination conflicts with a decision of the Supreme Court.

A material factor to be considered in determining whether Supreme Court review should be sought is whether the case in which the decision adverse to the Internal Revenue Service has been rendered may not turn on the particular facts involved and so not provide the direct conflict so essential to resolution of the legal question presented. Therefore, with respect to an issue of continuing importance to taxpayers everywhere and to the administration of the tax laws, the Internal Revenue Service will continue to litigate cases involving such a question with a view toward developing a satisfactory vehicle for Supreme Court clarification of the issue as soon as possible. It should be noted that where consideration of an adverse decision of substantial precedential value has led to the determination that it would be in the public interest not to accept such decision, but to continue to litigate the issue with a view toward clarification of the law, the policy of the Internal Revenue Service is to announce to the public the determination reached as promptly as possible. In the context of the responsibility imposed on the Commissioner of Internal Revenue for administration of tax laws and the care that must be taken to harmonize decisions by many courts with the sound administration of these tax laws, it can readily be seen that it would be inconsistent with the responsibility imposed on the Commissioner if the Internal Revenue Service were to acquiesce in the interpretation in tax matters of an ombudsman where it would not have done so with respect to the adverse decision of a court.

Congress decided as early as 1921, when it enacted section 1313 of the Revenue Act of 1921 (predecessor to section 6406 of the Code), that only the Internal Revenue Service should determine the merits of any claim under the Internal Revenue Code and that no other agency should review that determination. Section 6406 of the Code provides:

"In the absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Secretary or his delegate upon the merits of any claim presented under or authorized by the internal revenue laws and the allowance or nonallowance by the Secretary or his delegate of interest on any credit or refund under the internal revenue laws shall not, except as provided in subchapters C and D of chapter 76 (relating to the Tax Court), be subject to review by any other administrative or accounting officer, employee, or agent of the United States."

At the Senate Finance Committee hearings with respect to section 1313, the Treasury Department. It is a thing you can pass judgment upon very quickly. The provision resulted from the enactment of the Budget and Accounting Act of 1921 which established the General Accounting Office, stated:

"I have a new provision with relation to claims for refund of taxes in the Treasury Department. It is a thing you can pass judgment upon very quickly. The proposition is this: the new budget bill practically gives the right to a final determination on all claims against the Government. It puts it in the hands of the Comptroller General. He has the final say on all claims. The question is whether you want him to have the final say on these technical tax questions. In other words, you have a bureau up there which costs five, six, seven, or eight million dollars a year. It is technical in the highest extreme. I can not think of the Comptroller General performing that work satisfactorily without duplicating the machinery already provided." (Hearings before the Senate Finance Committee on the Revenue Act of 1921, H.R. 8245, 67th Cong., pp. 299–300 (1921))

To make clear that the provision was applicable to the General Accounting Office, the Revenue Act of 1924 added the words "or accounting" where they now appear between the words "administrative" and "officer". The bill would, by granting the Ombudsman authority to investigate and hold hearings on determinations made by the Commissioner, reverse long-standing Congressional policy that determinations of the Commissioner should not be subject to review by other administrative agencies of the Government.

The author, in his introductory remarks on the bill, indicated that the agencies to which the Ombudsman's jurisdicton would extend were selected because, "It is our opinion that the great bulk of citizens' complaints arise in connection with the above-mentioned agencies." The Department believes that, if any agency at the national level is to be made the subject of an innovative experiment of this nature, the agency selected be such as serves or deals with a relatively small number of person, administers a law that is not overly complex or frequently changed, and does not have so highly developed a review procedure as the Internal Revenue Service affords.

The proposed Ombudsman would be required to present annually to the President, the Congress, and the head of the Administrative Conference a written report on his activities for the preceding year. If historical precedent in other countries having an ombudsman is any guide, the report would consist of a detailed, case-by-case report on all matters handled by his office. It is said that Swedish officials anxiously search through the report each year to see if their names appear with a critical reference. (Bainbridge, "A Civilized Thing"—Interview with Mr. Bexelius, *New Yorker Magazine*, February 13, 1965) The Swedish Ombudsman, Mr. Bexelius, believes that his actions, especially his reports or the fear of his reports, "promotes uniformity" of interpretation of the law. (Statement of Hon. Alfred Bexelius, Hearing before the Senate Subcommittee on Administration and Procedure on S. Res. 190, 89th Cong. (1966)) However, there is another side of the "uniformity" imposed by Mr. Bexelius. Professor Gellhorn reports in his law review article case after case of judges and administrators who had accepted the Ombudsman's guidance or interpretation yet who had felt and still believed (and in one case all six judges of a court) that they had been right and the Ombudsman wrong. They had nevertheless accepted the Ombudsman's decision without contest because they did not want to get involved in a fight. The mental attitude apparently induced by the actions, or threat of actions, of the Ombudsman is destructive of the outlook required for imaginative and creative administration. Furthermore, personnel are, as it were, separated from their agency background when they are singled out for criticism by a national officer on a nationwide basis.

Under present procedures of the Internal Revenue Service, if a return is selected for audit and does not involve complex issues, the taxpayer will be asked to supply information through correspondence or to come to the district director's office with his records, for an interview (office audit). In the case of a more complicated return the examining officer will go to the place of business of the taxpayer (field audit) to examine his records.

First, the taxpayer can discuss the matter fully with the examining officer and try to reach an agreement at the threshold of the dispute. In the absence of an agreement, he can have a hearing with the examiner's supervisor. If agreement is still not reached, a further conference is available with the district

conference staff, still without the necessity of a written protest in smaller cases. If agreement is not reached upon this review, a further review is open to the taxpayer at the regional Appellate Division, which is separate and completely independent of the Audit Division and the examining officer. Both the district conference staff and the Appellate Division are charged with the responsibility of giving impartial and unbiased consideration to the taxpayer's contentions. If the taxpayer does not avail himself of the right to these reviews, or if no settlement is reached upon these reviews, litigation may ensue. Where no settlement is reached, a notice of deficiency is issued and the taxpayer may then file a petition in the Tax Court for a redetermination of the claimed deficiency, or the tax claimed may be paid and suit filed for its refund in the District Court or Court of Claims. Settlement opportunities will still be available to the taxpayer during litigation and a significant percentage of such disputes are resolved without a court decision.

Both the district conference and the Appellate Division hearing afford an inexpensive, speedy, and impartial review to the taxpayer. He can represent himself or be represented by counsel at these hearings—the choice is up to the taxpayer. Conferences are arranged at his convenience, near his home and, within reasonable limits, at a time most suitable and least costly to him. There are approximately 300 district and branch offices of the Audit Division at which conferences are granted, and 41 branch offices of the Appellate Division. Additionally, many confernces are conducted through "circuit riding" to places even nearer the taxpayer's home. There are approximately 1,050 district and Appellate conferees engaged in this administrative appeals activity. In the fiscal year ended June 30, 1967, the Internal Revenue Service examined some 3.1 million tax returns. Of this number, over 2.1 million were accepted without change, 390,000 taxpayers who were audited received $191 million in refunds and an additional $94 million was refunded to 1.5 million taxpayers who made mathematical errors in their returns resulting in overpayment of taxes. One of the 3.1 million returns examined, disputes arouse in only 74,000 cases. Forty-one thousand cases were handled by the district conference procedure in fiscal 1967, about 27,000 of these being settled by agreement at the district level. At the Appellate Division level, 92 percent of the cases handled in fiscal 1967 were settled, 6 percent were disposed of by default and only 2 percent, or 799 cases, went on to be tried before the Tax Court. This record is all the more impressive when it is considered that most cases before the Appellate Division represent the hard core of controversy: although only 1.7 percent of the returns examined were involved, the disputes concerned $1.8 billion, approximately 55 percent of the total deficiencies proposed by District Directors, The convenience, speed, and expertness available to taxpayers under the existing system exceed anything an Ombudsman could offer without duplicating the review structure already available.

The Department is also concerned that passage of the bill would jeopardize the effectiveness of the administrative handling of disputes. The organization and administration of the procedures responsible for the settlement of tax disputes is the product of considerable experience and analysis on the part of the Internal Revenue Service. Prior to the establishment of the Board of Tax Appeals in 1924, appellate administrative review was afforded taxpayers by a Committee on Appeals and Review in the Bureau of Internal Revenue. However, in order to afford taxpayers a judicial review prior to assessment of their tax, the Board of Tax Appeals was established in 1924, and its authority more completely defined in the Revenue Act of 1926. It was soon ascertained, however, that many cases were being tried before the Board on facts not previously disclosed to the administrative authority. Some taxpayers, having this additional forum, were hesitant to disclose fully their position before trial. Many of these cases would have been settled if the facts presented at the trial had been disclosed to the administrative authority. It was then that the predecessor of the Appellate Division was established in order to resolve the conflict between the necessity for a full disclosure and the desire of taxpayers not to reveal their case before trial. Thus, the Appellate Division today not only is responsible for the settlement of a significant number of disputes but it also provides resolution of factual matters and minor issues so as to clarify and narrow the issues tried.

The establishment of an ombudsman may jeopardize the present settlement procedures of the Internal Revenue Service by creating a situation similar to

that which existed upon the establishment of the Board of Tax Appeals. That is, it may be that many taxpayers who now avail themselves of the administrative machinery will decline to produce evidence at the examining officer's level or at any other administrative level, but instead will look to the ombudsman. The prospect of assistance by the ombudsman may cause taxpayers to refuse fully to negotiate the case in the previous administrative proceedings. Indeed, Professor Gellhorn notes, "From the complainants point of view, the great advantage of recourse to the ombudsman is that no further effort (and no expenditure whatsoever) is demanded. The ombudsman takes over the case as one to be pursued in the public interest. This, among other things, has often obviated the necessity of the complainants utilizing remedies that may still be available to him within the judicial or administrative process." (Gellhorn, op. cit. supra, 75 Yale L.J. 1, 16)

For these reasons, the Treasury Department is opposed to enactment of S. 1195.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

FRED B. SMITH,
General Counsel.

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS' AFFAIRS,
Washington, D.C., January 11, 1968.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: This is to acknowledge your letter of December 22, 1967, inviting the testimony of this agency on S. 1195, 90th Congress, a bill "To establish the Office of Administrative Ombudsman to investigate administrative practices and procedures of selected agencies of the United States."

We furnished a report to the Senate Committee on the Judiciary on this measure on November 16, 1967, a copy of which is enclosed and which you may desire to include in the hearing record as setting forth our position.

It is our understanding after a discussion with the members of the staff of your Subcommittee that you desire to have the Veterans Administration witness at the January 16 hearing to explain to the Subcommittee the function of our Contact Service in aiding claimants for veterans benefits in the preparation and presentation of claims and the representation afforded veterans by veterans organizations in the prosecution of claims for such benefits. Mr. Guy S. Williams, Assistant Director for Contact and Foreign Affairs of our Department of Veterans Benefits, will appear to present information on these matters to the Subcommittee.

I wish to thank you for affording us this opportunity to appear before your Subcommittee.

Sincerely,

W. J. DRIVER, *Administrator.*

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS,
Washington, D.C., November 16, 1967.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This will respond to your request for a report by the Veterans Administration on S. 1195, 90th Congress, a bill "To establish the Office of Ombudsman to investigate administrative practices and procedures of selected agencies of the United States."

The subject bill would create an "Administrative Ombudsman," independent of the executive department and under the direction and control of the Ad-

ministrative Conference of the United States. He would be appointed by the President with the advice and consent of the Senate for a term of five years, and would have jurisdiction to investigate the administrative acts, practices, or procedures of the Social Security Administration, Veterans Administration, Internal Revenue Service and the Bureau of Prisons, and any officer, employee, or member thereof acting or purporting to act in the exercise of his official duties. The bill would provide that appropriate subjects for investigation would include an administrative act, practice, or procedure of any of the designated agencies which might be contrary to law or regulation; unreasonable, unfair or oppressive; based wholly or partly on a mistake of law or fact; based on improper or irrelevant grounds; unaccompanied by an adequate statement of reasons; performed in an inefficient manner; or otherwise erroneous.

The Ombudsman could exercise his powers without regard to the finality of the administrative act. The Ombudsman could take jurisdiction on his own motion or on an oral or written complaint; conduct a complete investigation; refer the case back to the agency for further consideration or recommend modification, amendment or cancellation of an administrative act. If not satisfied with the agency action, he could transmit reports to the Chairman, Administrative Conference of the United States, appropriate Congressional Committees and publicize information to the general public.

The jurisdiction of the Ombudsman under the bill would have broad application to the millions of Veterans Administration adjudications on initial, supplemental and reopened claims, without regard to the claimant's failure to exhaust administrative remedy through appeal or finality either by failure to timely appeal, or through final appellate action. His jurisdiction presumably would extend beyond adjudicative actions to insurance application and contract actions, to determinations with respect to hospitalization and treatment of veterans and to loan guaranty actions. In addition, administrative actions in individual cases, the agency practice, procedure, and regulations, including those at the appellate level, would be subject to his jurisdiction.

The subject proposal is apparently based upon the Swedish system, where the Ombudsman handles about 1200 complaints each year. In the United States the potential workload for such office stemming from the millions of Veterans Administration adjudicative and administrative actions and the Board of Veterans Appeals' 24,000 decisions annually would be very large. As long as there is recourse to another office for review of agency action, even though without enforcement powers, it is reasonable to expect that a substantial number of those dissatisfied with the result would avail themselves of its facilities. When the potential Veterans Administration workload is considered, together with that stemming from the other agencies listed, the size of the possible workload of the office of Ombudsman is staggering. Moreover, the legal, medical, and administrative expertise necessary to effectively handle complaints would require a large professional staff.

It should be noted that the Veterans Administration does not stand in an adverse position to claimants for veterans benefits. To the contrary, every effort has been made to maintain an informality of proceedings and ease of prosecution of claims to assure that all meritorious claims are allowed. Claims not initially allowed are subject to an appeal procedure with built-in due process safeguards recently enacted by Congress in Public Law 87–666, which, among other things, require that a claimant or his representative be furnished a statement of the case summarizing the evidence, the applicable law, the decision on each issue, and the reason therefor.

Moreover, the Veterans Administration under authority contained in section 3311 of title 38, United States Code, maintains in its field stations, contact

offices whose function is to assist veterans in the preparation and presentation of claims for benefits. Veterans who feel they need further assistance may enlist, without charge, the aid of representatives of service organizations who by statute (section 3402 of title 38, United States Code) may be recognized for the purpose of presentation and prosecution of claims and to whom the Veterans Administration records are made available. In some cases such representatives are furnished office space within the field station by the Veterans Administration, thus being immediately available to any claimant who feels the need for their services.

In view of the foregoing, we are unable to foresee the accrual of any additional advantage to the claimant, insofar as veterans benefits programs administered by the Veterans Administration are concerned, which would result from the enactment of the subject bill. Therefore, we cannot recommend favorable consideration of S. 1195, 90th Congress, by your Committee.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the presentation of this report to your Committee.

Sincerely,

W. J. DRIVER, *Administrator.*

[Excerpt From Committee Print entitled "Ombudsmen—1967 Compilation of State Proposals"]

LETTER TO ALL STATE LEGISLATURES REQUESTING MATERIALS ON OMBUDSMAN PROPOSALS

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,
May 12, 1967.

DEAR SIR: The Senate Subcommittee on Administrative Practice and Procedure, of which I am chairman, is continuing its research into the office and function of ombudsman. Recently, the State of Hawaii became the first State in the Nation to officially create the office. According to reports received in Washington, several other States are actively considering creation of a similar office.

In order that the subcommittee can be better informed on the current status of these ombudsman proposals, and so that the subcommittee can effectively assist those State and local governments which have requested such assistance, we would appreciate receiving the following information from you:

1. Have any bills to create an ombudsman (or similar office ever been introduced in your State legislature? Please send duplicate copies, if possible.
2. Have hearings or other committee meetings been held on these measures?
3. Has any legislative action (positive or negative been taken on any ombudsman proposal in your State?

If you have any additional information, reports, or statements, we would certainly appreciate receiving them. The Senate Subcommittee on Administrative Practice and Procedure has issued a number of documents on this subject and will be happy to send them to you upon your request.

If we can be of any assistance to you, please feel free to call on us.

Kind regards.

Sincerely,

EDWARD V. LONG, *Chairman.*

92-137—68——5

OMBUDSMAN PROPOSALS IN THE UNITED STATES, AS OF MAY 1967

[H.B.—House Bill; S.B—Senate bill; A.B.—Assembly bill; H.F.—House file; S.F.—Senate file]

States	Bills introduced for creation of State ombudsmen (or similar offices)	Hearings or other committee meetings held	Legislative action taken	Ombudsman appointed
Alabama	No bills introduced.			
Alaska	H.B. 450; S.B. 276 (1966)	S.B. 276 referred to senate finance and judiciary committee.	1966—H.B. 450 was passed by the house only; no action taken on other bills in 1967.	
	H.B. 8; H.B. 52 (1967)	Others referred to house finance and judiciary committee. Hearings held, committee reports issued.		
Arizona	No bills introduced.			
Arkansas	do.			
California	A.B. 1020	Referred to committee on government organization. Continuation of hearings on ombudsman concept.	Passed assembly by 42 to 32 vote; then referred to senate governmental efficiency committee.	
Colorado	H.B. 1223	Referred to house State affairs committee.	No floor action taken.	
	S.B. 192	Referred to senate judiciary committee. Bills died in committee.		
Connecticut	H.B. 3606; H.B. 4137	Referred to house committee on the judiciary and governmental functions.	do.	
	S.B. 1365; S.B. 1427; S.B. 1455	Referred to senate committee on judiciary. Hearings held (not reported out of committees; died in committees).		
Delaware	No bills introduced.			
Florida	H.B. 328	Referred to house committee on State government organization and efficiency (unanimously passed committee); went to house appropriations committee (reported out with 1 dissenting vote).	No floor action taken.	
	S.B. 301	Referred to senate judiciary committee (favorably reported out); then went to State government reorganization committee (favorably reported out, 5 to 4 vote); now in senate appropriations committee.		
Georgia	No bills introduced.			
Hawaii	S.B. 19	Referred to senate committee on Federal-State-country relations and government efficiency (reported favorably on Mar. 30, 1967, in Committee Rept. 76). Then referred to senate committee on the judiciary (reported on Apr. 17, 1967, in Committee Rept. 316). Finally referred to senate committee on ways and means (reported favorably on Apr. 21, 1967, in Committee Rept. 456).	Passed senate (went to house committee).	1st State in Union to pass bill for the creation of an ombudsman. As of Nov. 1, 1967, no ombudsman had been appointed.
		Referred to house committee on government efficiency and public employment (reported favorably on Apr. 28, 1967, H. Rept. 865).		
Idaho	No bills introduced.			

Illinois	S.B. 973	Referred to committee on assignment of bills	
Indiana	H. Con. Res. 30		House adopted H. Con. Res. 30 by voice vote (not acted upon by senate).
	H.B. 1234; H.B. 1246	Referred to house committee on rules and legislative procedures (not reported out).	No floor action taken on H.B. 1234 and H.B. 1246
	(No legislation introduced in recent session.)		
Iowa	H.F. 483	Referred to house judiciary committee	No floor action taken.
Kansas	S.F. 455	Referred to senate judiciary committee.	
Kentucky	No bills introduced		
Louisiana	do		
Maine	do		
	S.B. 1091	Referred to senate committee on State government (hearing held; not reported out).	No floor action taken.
Maryland	H.B. 426; H.B. 701	Referred to house judiciary committee	do
	S.B. 465	Referred to senate judicial proceedings committee (hearings were held). Died in committees.	
Massachusetts	H.B. 2299	Referred to joint committee on State administration (reported favorably by committee; redrafted for presentation to the house).	do
Michigan	H.B. 2968	Referred to house committee on State affairs	do
	S.B. 730	Referred to senate committee on State affairs. Not reported out by either committee.	
Minnesota	H.F. 1340	Referred to house civil administration committee (hearings held; favorably reported); re-referred to house appropriations committee.	do
	S.F. 1118	Referred to senate judiciary committee (no action taken.)	
Mississippi	H.F. 1336; S.F. 1536	Referred to committees (no action taken).	
Missouri	No bills introduced		
	H.B. 486	Referred to house committee on the judiciary (still in committee).	No floor action taken
Montana	H.B. 511	On the perfection calendar.	
Nebraska	No bills introduced		
Nevada	do		
	A.B. 244	Referred to committee on legislative functions (no public hearings held; died in committee).	No floor action taken.
New Hampshire	S.B. 215	Referred to senate committee on executive departments, municipal and county government (no action taken).	do
New Jersey	No response		
New Mexico	S.B. 10	Double referral to senate finance committee and senate public affairs committee; reported favorably by public affairs committee; reported out later by finance committee without recommendation; hearings held on bill.	Senate floor action (failed final passage, 20 to 21); motion was made to reconsider bill (motion defeated, 22 to 16); bill was defeated.
New York	S.B. 1; S.B. 9	Both referred to senate committee on finance.	No floor action taken.
	A.B. 87	Referred to committee on ways and means.	
	A.B. Print 1566	None of bills has come out of committee.	
North Carolina	No response		
North Dakota	No bills introduced		

OMBUDSMAN PROPOSALS IN THE UNITED STATES, AS OF MAY 1967—Continued

[H.B.—House Bill; S.B—Senate bill; A.B.—Assembly bill; H.F.—House file; S.F.—Senate file]

States	Bills introduced for creation of State ombudsmen (or similar offices)	Hearings or other committee meetings held	Legislative action taken	Ombudsman appointed
Ohio	S.B. 243	Referred to senate ludiciary committee; 1st hearing was scheduled for May 22.	No floor action taken	
Oklahoma	No bills introduced			
Oregon	S.B. 10	Referred to senate State and Federal affairs Committee with a subsequent referral to ways and means committee (hearings held on bill).	No floor action taken	
Pennsylvania	H.B. 794; H.B. 837	Both referred to house committee on State government (H.B. 837 reported out of committee as committed).	H.B. 837 passed 1st reading and was recommitted to the committee on appropriations.	
Rhode Island	S.B. 501; S.B. 518 S. 182	Both referred to committee on State government. Referred to senate committee on finance (reported out).	Passed senate; then referred to house committee on finance.	
South Carolina	No bills introduced			
South Dakota	do			
Tennessee	do			
Texas	do			
Utah	H.B. 201	Referred to the joint legislative operations committee.	Passed the legislature	Legislative form of ombudsman—"Created Utah's legislative investigating committee in the 1967 legislature. This committee acts as an ombudsman for the State." (See letter in next section.)
Vermont	No bills introduced			
Virginia	do			
Washington	H.B. 756 S.B. 29	Referred to house judiciary committee (hearings were held; not reported out). Referred to senate ludiciary committee (hearings were held; favorably reported out; never voted out of rules committee).	No floor action taken	
West Virginia	No bills introduced			
Wisconsin	A.B. 77 S.B. 102	Referred to committee on the judiciary (public hearing held; awaiting executive action). Referred to joint committee on finance (no hearing held).	No floor action taken	
Wyoming	No bills introduced			

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[Excerpt From "Ombudsmen for American Government?"]

(Edited by Stanley V. Anderson)

APPENDIX: ANNOTATED MODEL OMBUDSMAN STATUTE

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What follows is a "model" bill to establish the ombudsman system in American states and cities. The bill can be adapted to the needs of various states with little change. It is also suitable as a local enactment by a municipality that has constitutional or statutory authority to create its own governmental instrumentalities. The extent of allowable home rule must, of course, be considered closely by local counsel.

This draft builds upon foundations others have laid. Ralph Nader drafted the first ombudsman bill for consideration by an American legislature; it was introduced in Connecticut in 1963. The first model bill was creditably prepared by the Harvard Student Legislative Research Bureau. Both of the proposals leaned heavily on the New Zealand ombudsman statute of 1962, which itself had been influenced by the Danish law. Other American proposals have also been helpful, notably Senator Edward V. Long's bill to establish a District of Columbia ombudsman and the bill of Senator Jack E. Bronston and Assemblyman S. William Green to create an office of public redress in the State of New York.

A BILL To establish the Office of Ombudsman in _____

[Enactment clause in locally appropriate form]

SECTION 1. SHORT TITLE.—This Act may be cited as The _____ [insert name of state, city, or other entity] Ombudsman Act.

Comment: The "foreign-sounding word" *ombudsman* has gained wide usage in America and many other countries. Its distinctiveness makes it preferable to more usual official titles such as "commissioner" or "director." The position, new in American experience, deserves a new identification.

SEC. 2. DEFINITIONS.—As used in this Act, the term—

(a) "Administrative agency" means any department or other governmental unit, any official, or any employee of _____ [state, city, or other entity involved] acting or purporting to act by reason of connection with _____ [again insert name of state, city, or other entity] but it does not include (1) any court or judge or appurtenant judicial staff, (2) the members of the _____ [insert name of the legislative body, e.g, City Council] or the staffs of that body, its committees, or its members, or (3) the _____ [insert title of chief executive] or his personal staff.

Comment: Traditional immunization of courts against extra-judicial scrutiny argues against permitting an American ombudsman to inquire into a judge's behavior. Legislators and the chief executive are directly answerable to the electorate; their conduct in office tends in any event to be conspicuous and subject to continuous political examination. Other elected officials (such as, in some jurisdictions, members of regulatory bodies, law enforcement officials, and educational administrators) are less immediately involved in policy making and are engaged chiefly in administrative matters indistinguishable from those performed by non-elected officials generally. Their inclusion within the reach of the Ombudsman Act therefore seems desirable.

If a state bill were to be drafted, a fourth exception should be considered, as follows: "(4) any instrumentality of any political subdivision of the state." This would make clear that the state ombudsman should avoid dealing with municipal and county affairs, if state superintendence of local officialdom is deemed undesirable. In a state-wide bill prudence may also dictate a fifth specific exclusion to make indisputable that interstate bodies such as the Port of New York Authority or the Delaware River water resources board are not meant to be reached, though this specifically is perhaps not really needed: "(5) any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

(b) "Administrative act" includes every action (including decisions, omissions, recommendations, practices, or procedures) of an administrative agency.

SEC. 3. ESTABLISHMENT OF OFFICE.—The office of Ombudsman is hereby established as an independent agency of _____ [insert name of state, city, or other entity].

Comment: Whether the Ombudsman can be a wholly independent entity or must instead be included within the Executive or the Legislative Branch depends upon the local constitution or character. Organizational detachment is the desired estate if it can be achieved constitutionally.

SEC. 4. APPOINTMENT.—The _____ [insert title of chief executive] shall appoint the Ombudsman, subject to confirmation by two-thirds of the members of each chamber of the _____ [insert name of legislative body], present and voting.

Comment: In foreign countries the ombudsman has been elected by the legislature. The governmental structure in those countries differs, however, from the American pattern. Appointive officials, whatever their nature, are customarily chosen in American jurisdictions by the Chief Executive, subject sometimes to legislative confirmation. The present proposal contemplates confirmation by an unusually substantial vote in both chambers (if two exist) rather than in the Senate alone. This is intended to stress the "non-political" nature of the appointment and to reflect the need for the general acceptability of the person chosen. Whether the required majority be two-thirds of those voting or some other figure can, of course, be fixed in accord with local preference or precedent.

Some persons favor direct legislative selection, without participation by the Executive. Thus a Florida bill proposes simply that the ombudsman is to be "appointed by agreement of the president of senate and the speaker of the house subject to confirmation by a majority of the members of each chamber of the legislature." A Connecticut bill provides that one or more candidates "shall be selected by the judiciary committee and reported to the general assembly," after which the ombudsman is to be "elected by a vote of either a majority of each major political party or a two-thirds majority of the general assembly." A more elaborate plan has been advanced in California. It envisages a "Joint Legislative Committee on Administrative Justice" composed of three senators and three representatives affiliated with each political party. If a party has fewer than three members in the Senate or Assembly, as the case may be, only one member of that party from that house will serve on the joint committee. The committee is to nominate the ombudsman by an absolute majority vote, and the nominee is to be "appointed to the office of Ombudsman by concurrent resolution of the Legislature."

All the plans emphasize the desirability of "de-politicalizing" the selection process.

The California plan contemplates that the joint committee will have a continuing existence and will be available for consultation by the ombudsman "as he deems necessary to the execution of his powers and duties." No matter how the office of ombudsman may be filled, some such provision in the legislature's own internal organization would be desirable so that the ombudsman can have a regular point of contact when needed.

SEC. 5. QUALIFICATIONS.—The Ombudsman shall be a person well equipped to analyze problems of law, administration, and public policy, and shall not be actively involved in partisan affairs.

Comment: Efforts to define the qualities sought in an ombudsman tend to result in a catalogue of human virtues, leading one person to remark that if ever such a man were found, he would instantly be cast in bronze rather than appointed to a mundane office. Experience abroad points clearly to the desirability of the ombudsman's having a legal background because he must deal with many grievances that hinge on analysis of statutes and rulings. Requiring any specific experience or absolutely excluding any category of persons (for example, those who have recently been legislators or have held other office) seems undersirable. The consensus of opinion that will presumably support legislative confirmation should be an adequate barrier against unsuitable nominees.

SEC. 6. TERM OF OFFICE.—(a) The Ombudsman shall serve for a term of five years, unless removed by vote of two-thirds of the members of each of the two chambers of the _____ [insert name of legislative body] upon

their determining that he has become incapacitated or has been guilty of neglect of duty or misconduct.

Comment: The Ombudsman should be secure, but not absolutely untouchable. The proposed provision would adequately guard against casual threats. An alternative would be to provide simply that the Ombudsman shall serve out his term, unless "impeached by the [legislature] in accord with the procedures prescribed by the constitution." The likelihood of removal is extremely slim, in any event.

(b) If the office of Ombudsman becomes vacant for any cause, the Deputy Ombudsman shall serve as Acting Ombudsman until an Ombudsman has been appointed for a full term.

Comment: Whether the term of office should be more or less than five years is not demonstrable. Abroad, no term exceeds four years. Here, some persons believe that the detachment of the Ombudsman from the Chief Executive will be accentuated if a vacancy does not automatically coincide with the inauguration of a new mayor or governor. Some advocate an even longer term than five years. In my opinion, the length of the term is not very important. If the institution proves its worth, tinkering with the Ombudsman's independence would be so politically perilous as to be altogether unlikely. To guard against sudden attacks upon an incumbent, removability should be made difficult, as has been done in this draft. As for vacancies, I favor a stopgap until a permanent appointment can be made for a full term, rather than (as others have sometimes suggested) an appointment merely for the balance of the unexpired term.

In New Zealand the incumbent Ombudsman continues serving beyond the expiration of his term, unless and until a successor has qualified. Although this assures continuity of Ombudsman services, it means that the hold-over Ombudsman has no security of tenure, a circumstance that may at least theoretically expose him to undesirable pressures.

SEC. 7. SALARY.—The Ombudsman shall receive the same salary, allowances, and related benefits as the chief judge of the highest court of_____ [name of state].

Comment: Setting the Ombudsman's pay and perquisites at the level of the highest ranking judge will give the new office a desirably high prestige, will eliminate wrangling now and in the future about the appropriate dollar amount of the Ombudsman's salary, and will avoid the obsolescence that would soon occur if the desired salary were to be precisely stated. If the Ombudsman is connected with a governmental subdivision rather than with the state itself, some other comparison would be appropriate.

SEC. 8. ORGANIZATION OF OFFICE.—(a) The Ombudsman may select, appoint, and compensate as he may see fit (within the amount available by appropriation) such assistants and employees as he may deem necessary to discharge his responsibilities under this Act.

(b) The Ombudsman shall designate one of his assistants to be the Deputy Ombudsman, with authority to act in his stead when he himself is disabled or protractedly absent.

(c) The Ombudsman may delegate to other members of his staff any of his authority or duties under this Act except this power of delegation and the duty of formally making recommendations to administrative agencies or reports to the _____[insert title of chief executive] or the_____ [insert name of legislative body].

Comment: This section gives the Ombudsman a free hand in staffing his office, without even the restraints of civil service and classification acts. The highly personal nature of the Ombudsman's work, coupled with its essentially experimental nature, justifies giving this leeway to so highly placed and, by hypothesis, responsible an official. For the same reasons the Ombudsman has been given a free choice about assigning duties and subdelegating powers, with the single limitation that when criticisms or proposals for change are to be voiced in a formal manner, only the Ombudsman himself may be heard (except when the Deputy Ombudsman is in full charge during the Ombudsman's disability or protracted absence).

SEC. 9 POWERS.—Thes Ombudsman shall have the following powers:

(a) He may investigate, on complaint or on his own motion, any administrative act of any administrative agency.

Comment: The power to investigate should be stated unqualifiedly, though later sections will indicate the grounds that justify action by him and will

thus suggest the occasions on which investigation would be suitable. Experience abroad leads me to believe that efforts to define jurisdiction have caused much laborious and essentially unproductive hairsplitting; a more general grant of power to investigate will eliminate some "legalistic" analysis in the beginning of the Ombudsman's work, but his own discretion will lead him to set sensible boundaries to the areas within which he will investigate, lest he be crushed by the burden of unproductive work.

(b) He may prescribe the methods by which complaints are to be made, received, and acted upon; he may determine the scope and manner of investigations to be made; and, subject to the requirements of this Act, he may determine the form, frequency, and distribution of his conclusions and recommendations;

Comment: Some foreign statutes require that complaints be written. Leaving matters of this kind to the Ombudsman's choice in the light of experience is preferable. Similarly, giving the Ombudsman power to shape his own investigations is desirable; any implication that he should utilize the same method at all times should be avoided, as should any requirement of formal hearings of an adversary nature. If a proceeding for the taking of testimony were in fact to occur, it should be perceived as an element of an investigation rather than as a proceeding in the nature of a trial. Hence its content need not necessarily be the same as would normally be demanded in a formal adjudicatory hearing.

(c) He may request and shall be given by each administrative agency the assistance and information he deems necessary for the discharge of his responsibilities; he may examine the records and documents of all administrative agencies; and he may enter and inspect premises within any administrative agency's control.

Comment: Experience elsewhere suggests that the Ombudsman will be given ready access to official papers or other information within the administrative agency. Cooperative working relationships have been readily established so that the Ombudsman's need for documentary material has not conflicted with the administrators' continuing need to use the same material. As for inspection of administrative offices and installations, this draft gives the Ombudsman power to inspect but imposes no duty to do so routinely, as has been required of the Ombudsman in several Scandinavian countries.

(d) He may issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence the Ombudsman deems relevant to a matter under his inquiry.

Comment: Every existing Ombudsman statute provides very broadly for the use of compulsory process in order to obtain needed information. In point of fact, however, the subpoena power has virtually never been used abroad, since information has been freely given. Concern has nevertheless been expressed in this country that wide-ranging inquiries into public administration might lead to burdensome demands. Hence Section 18, below, takes pains to stress protections for witnesses, even though the occasions for bringing them into play are likely to be very few indeed.

(e) He may undertake, participate in, or cooperate with general studies or inquiries, whether or not related to any particular administrative agency or any particular administrative act, if he believes that they may enhance knowledge about or lead to improvements in the functioning of administrative agencies.

Comment: If foreign experience is an accurate guide, work on individual complaints will chiefly preoccupy the Ombudsman's energies and attention. Nonetheless, he should be clearly empowered to address himself to general problems (some of which, indeed, may not be reflected at all in current complaints) and should be free to work not only with other governmental bodies, but also with non-governmental research enterprises which, in the United States much more than in most other countries, provide a great deal of the manpower, insight, and enthusiasm that underlie governmental improvements.

SEC. 10. MATTERS APPROPRIATE FOR INVESTIGATION.—In selecting matters for his attention, the Ombudsman should address himself particularly to an administrative act that might be—

(1) contrary to law or regulation;

(2) unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;

(3) mistaken in law or arbitrary in ascertainments of fact;

(4) improper in motivation or based on irrelevant considerations;

(5) unclear or inadequately explained when reasons should have been revealed;

(6) inefficiently performed; or

(7) otherwise objectionable.

(b) The Ombudsman may concern himself also with strengthening procedures and practices which lessen the risk that objectionable administrative acts will occur.

Comment: The statute desirably details the kinds of administrative acts whose occurrence has chiefly generated demands for the ombudsman system. This draft sets them forth as guides, not as limitations. The Ombudsman is told to devote himself to these types of problems, but he needs not feel himself confined to them if the catalog later be found to be incomplete. Moreover, subparagraph (b) makes clear that the Ombudsman should have a large and continuous interest in "preventive medicine" rather than solely in trying to abate a difficulty after it has arisen.

As forthe types of problems listed in subparagraph (a), most are self-explanatory, but a few may deserve explanation. Subsection (3) refers to acts that rest on arbitrary ascertainments of fact. Very clearly, the Ombudsman must not attempt to be a super-administrator, doing over again what specialized administrators have already done and, if he disagrees, substituting his judgment for theirs. In some instances, however, the propriety of an administrative act may rest wholly on a factual determination that in turn rests on an excessively flimsy foundation. As in cases that go to courts for review, the Ombudsman should not regard as "arbitrary" anything and everything with which he disagrees; but he should be in a position to say, in essence, that reasonable men would not have found the facts in the way the administrator did.

Subsection (5) is not intended to create a new legal requirement that findings of fact and conclusions of law accompany every administrative act. It means merely that official actions should be understandable and, usually, should be explained when those affected by them seek fuller understanding. Experience abroad shows that this is one of the areas most fruitfully cultivated by ombudsmen.

Subsection (6) refers to administrative acts that may lie within the zone of legality, but might nevertheless be subject to improvement in the future. Thus, for example, the form of decision given by a Scandinavian administrator to old age pensioners caused later distress because the pensioners read into it some hopes that were not justified by existing law. The Ombudsman found nothing improper in the decisions that had been made, but suggested some purely stylistic changes that eliminated the bewildering "officialese" previsiously in use.

Subsection (7) uses a catch-all phrase, "otherwise objectionable." This will perhaps emphasize the Ombudsman's concern with such matters as rudeness and needless slowness, both of which bulk large among citizens' grievances.

SEC. 11. ACTION ON COMPLAINTS.—(a) The Ombudsman may receive a complaint from any source concerning an administrative act. He shall conduct a suitable investigation into the things complained of unless he believes that—

(1) the complainant has available to him another remedy or channel of complaint which he could reasonably be expected to use;

(2) the grievance pertains to a matter outside the Ombudsman's power;

(3) the complainant's interest is insufficiently related to the subject matter;

(4) the complaint is trivial, frivolous, vexatious, or not made in good faith;

(5) other complaints are more worthy of attention;

(6) the Ombudsman's resources are insufficient for adequate investigation; or

(7) the complaint has been too long delayed to justify persent examination of its merit.

The Ombudsman's declining to investigate a compliant shall not, however, bar him from proceeding on his own motion to inquire into the matter complained about or into related problems;

Comment: The duty to act on every complaint should not be imposed, partly because the dimensions of the work burden cannot be exactly predicted and partly because some complaints will show on their face that they are unlikely to lead to productive findings. The above listing leaves the

Ombudsman free to reject complaints, but does not bar his making inquiries. Specifically, he need not reject a complaint because another judicial or administrative remedy exists. Normally, one may suppose, the Ombudsman will insist that matters proceed through regular channels. Explaining to a complainant the steps he can take to obtain review will usually suffice. But assuredly some cases will arise in which the burdens of expense and time are realistic barriers to a complainant's pursuing the theoretically available remedies. In those instances access to the Ombudsman should not be precluded. Subsection (1) leaves the avenue open, but the traffic is still subject to control.

Another policy choice is reflected in Subsection (3) which does not require that every complaint be based on a claimed invasion of a strictly personal interest. This permits a complainant to bring to the Ombudsman's notice a matter of public rather than purely private concern. But if the complainant's concern with the subject matter is too attenuated, the Ombudsman may choose not to investigate.

Subsection (7) does not contain an explicit "statute of limitations" on complaints, though the Ombudsman is left free to reject those based on stale claims or ancient grudges. In Sweden complaints must be acted on if filed within ten years of the events in question; Denmark, New Zealand, and Norway, by contrast, require rejection of any complaint pertaining to occurrences beyond the preceding twelve months. Neither extreme seems desirable. The present draft lays down no rule in this respect, but allows the Ombudsman to pick his way at the outset. Later, in the light of experience, he may wish to promulgate some rules of his own, as is allowed by Section 9(b), above.

(b) After completing his consideration of a complaint (whether or not it has been investigated) the Ombudsman shall suitably inform the complainant and the administrative agency or agencies involved.

Comment: A decision not to investigate a complaint does not mean that it has been altogether ignored. For example, the Ombudsman and the agency involved may regard the complaint as an adequate equivalent of a petition for administrative review of which the complainant has not yet availed himself; the Ombudsman may in such a case simply forward the complaint to the appropriate appellate authority, advising the complainant that this has been done in his behalf. In other instances very extensive legal analysis may be undertaken preliminarily, leading to the conclusion that no grievance could be found to exist. In such a case the Ombudsman may be expected to write an explanatory opinion that, if foreign experience is duplicated in this country will in the generality of instances prove wholly persuasive to the complainant. Flatly requiring the Ombudsman to state reasons whenever he decides not to investigate should, however, be avoided. Numerous complaints show on their face that they are psychopathic rather than governmental in nature. The Ombudsman's judgment must be relied upon to determine the suitable response in those instances. All practicing ombudsmen do in fact take great pains to communicate fully and frankly with complainants, in general. This is particularly true as to cases whose merits have been explored. The Ombudsman's findings and reasoning have powerfully shaped public opinion as well as official attitudes. Conclusions adverse to a complainant's position deserve to be well explained, as has been done consistently by all foreign ombudsmen.

Some proposals have explicitly required that if a complaint has reached the Ombudsman through a member of the legislature, the Ombudsman must report his findings and recommendations (if any) to the legislator who had forwarded his constituent's complaint. Undoubtedly the Ombudsman, guided by ordinary tact and prudence, would routinely furnish to legislative intermediaries copies of his explanations to complainants and affected officials; making statutory provision for simple courtesy seems unnecessary. If anything more is intended by the suggested requirement that the Ombudsman "report" to a legislator who has forwarded a constituent's complaint, the requirement should be resisted. The Ombudsman should not be perceived as a staff aide whose activities may be directed by individual legislators, to whom he must then report back.

(c) A letter to the Ombudsman from a person in a place of detention or in a hospital or other institution under the control of an administrative agency shall be immediately forwarded, unopened, to the Ombudsman.

Comment: A provision of this nature has commonly been included in ombudsman statutes. It provides a measure of psychological assurance that everyone may have ready access to the Ombudsman without fear of reprisal.

SEC. 12. CONSULTATION WITH AGENCY.—Before announcing a conclusion or recommendation that criticizes an administrative agency or any person, the Ombudsman shall consult with that agency or person.

Comment: No provision need be made for giving specific notice that the Ombudsman has decided to investigate, if he does so decide. He will inescapably be in communication with the administrative agency when he needs its information or opinions. Formalities should be avoided lest a small organization be overborne by essentially ceremonial requirements.

At the point of announcing his conclusions, however, the Ombudsman should guard against his own mistakes by consulting those whom his findings may hurt. The requirement that he consult will not substantially impede his work, but will be a protection for all concerned against unwitting errors in fact, judgment, or expression.

SEC. 13. RECOMMENDATIONS.—(a) If, having considered a complaint and whatever material he deems pertinent, the Ombudsman is of the opinion that an administrative agency should (1) consider the matter further, (2) modify or cancel an administrative act, (3) alter a regulation or ruling, (4) explain more fully the administrative act in question, or (5) take any other step, he shall state his recommendations to the administrative agency. If the Ombudsman so requests, the agency shall, within the time he has specified, inform him about the action taken on his recommendations or the reasons for not complying with them;

Comment: Though the Ombudsman will rarely have reason to make a recommendation if he does not find an error in what the administrative agency has done or neglected to do, he should remain free to suggest improvements in method or policy even when the existing practice may be legally permissible. Thus he may facilitate one agency's learning about and taking advantage of the experience of another.

Section 13 (a) contemplates no entry of judgment, as it were, but simply the expression of opinion by the Ombudsman. He is not a superior official, in a position of command. He cannot compel a change in an administrative act. His recommendation may, however, induce an agency to exercise whatever power it itself may still possess to right what the Ombudsman points out as a past mistake. Bearing in mind that consultation under Section 12 will precede recommendation under Section 13, one may safely predict that rashly critical opinions will not be expressed.

(b) If the Ombudsman believes that an administrative action has been dictated by laws whose results are unfair or otherwise objectionable, and could be revised by legislative action, he shall bring to the _____'s [name of legislative body] notice his views concerning desirable statutory change.

Comment: This subsection makes clear that the Ombudsman's duty extends beyond simply finding that an administrator acted in accord with existing statutory law; if the law itself produces unjust results, he should bring this to legislative notice. He is not meant to be a general social reformer, but he does have an obligation to take note of statutory provisions that cause unexpectedly harsh administration.

SEC. 14. PUBLICATION OF RECOMMENDATIONS.—The Ombudsman may publish his conclusions, recommendations, and suggestions by transmitting them to the _____ [title of Chief Executive] the _____ [name of legislative body] or any of its committees, the press, and others who may be concerned. When publishing an opinion adverse to an administrative agency or official he shall (unless excused by the agency or official affected) include the substance of any statement the administrative agency or official may have made to him by way of explaining past difficulties or present rejection of the Ombudsman's proposals.

Comment: Bringing his views into the open is the Ombudsman's sole means of gaining the public's support. This section permits publication even when an agency has accepted a recommendation. Publicity may be needed to call other administrators' attention to current developments and also to remind the public at large that the Ombudsman is functioning for the citizenry's benefit. Publicity, however, occurs at the end and not at the beginning of discussions

with the agency involved. Persuasion is the chief instrument in gaining administrative agencies' favorable response to suggestions. Only when persuasion fails will the Ombudsman begin to think about mobilizing the force of public opinion. To guard against one-sidedness, the Ombudsman is required to disclose the criticized agency's or official's view of the matter along with his own, when the two views differ.

SEC. 15 REPORTS.—In addition to whatever reports he may make from time to time, the Ombudsman shall on or about February 15 of each year report to the ---------- [name of legislative body] and to the ---------- [title of the chief executive] concerning the exercise of his functions during the preceding calendar year. In discussing matters with which he has dealt, the Ombudsman need not identify those immediately concerned if to do so would cause needless hardship. So far as the annual report may criticize named agencies or officials, it must also include the substance of their replies to the criticism.

SEC. 16. DISCIPLINARY ACTION AGAINST PUBLIC PERSONNEL.—If the Ombudsman has reason to believe that any public official, employee, or other person has acted in a manner warranting criminal or disciplinary proceedings, he shall refer the matter to the appropriate authorities.

SEC. 17. OMBUDSMAN'S IMMUNITIES.—(a) No proceeding, opinion, or expression of the Ombudsman shall be reviewable in any court;

(b) No civil action shall lie against the Ombudsman or any member of his staff for anything done or said or omitted, in discharging the responsibilities contemplated by this Act;

(c) Neither the Ombudsman nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce this Act.

Comment: Subsection (a) precludes judicial review of the Ombudsman's work. This preclusion simply recognizes that the Ombudsman issues no orders and takes no steps that bar anyone from pursuing preexisting remedies.

Subsection (b) extends to the Ombudsman's office the immunity from harassment by lawsuit that is shared by judges and many other officials. It does not preclude criminal prosecution were serious misconduct ever to be brought to light; moreover, Section 6 provides for removal from office were the Ombudsman to be found miscreant.

Subsection (c) saves the Ombudsman's office from the awkardness of interrupting its ongoing work in order to testify about matters concerning which it may have received information (often given in confidence). The subsection does not, however, preclude the Ombudsman's testifying in proceedings needed to enforce the Act, such as an action to compel compliance with a subpoena or a prosecution against a violator under Section 19, below. The subsection does prevent his being used as an adjunct to private litigation.

SEC. 18. RIGHTS AND DUTIES OF WITNESSES.—(a) A person required by the Ombudsman to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the courts of this state;

(b) A person who, with or without service of compulsory process, provides oral or documentary informtaion requested by the Ombudsman shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

(c) If a person refuses to respond to the Ombudsman's subpoena, refuses to be examined, or engages in obstructive misconduct, the Ombudsman shall certify the facts to the ---------- [insert name of suitable court] The Court shall thereupon issue an order directing the person to appear before the court to show cause why he should not be punished as for contempt. The order and a copy of the Ombudsman's certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge himself of the contempt in the same way as in the case of a person who has committed a contempt in the trial of a civil action before the court.

Comment: Subsection (c) describes the manner of enforcing subpoenas through independent judicial examination of the matter. The procedure here proposed is derived from California Government Code § 11525. In all probability, the need to enforce subpoenas will not in fact arise. Information already in the possession of an administrative agency will be freely accessible to the Ombudsman. Information in a complainant's possession will of course be gladly supplied. Occasions on which data must be dragged from reluctant third parties are not likely to occur.

SEC. 19. OBSTRUCTION.—A person who willfully obstructs or hinders the proper exercise of the Ombudsman's functions, or who willfully misleads or attempts to mislead the Ombudsman in his inquiries, shall be fined not more than $1,000.

Comment: If the enactment be by a municipality, counsel should determine whether the local legislature has power under state law to create an offence punishable by a heavy fine. Counsel must determine in each state whether necessity exists for indicating the court in which proceedings are to be brought, and upon whose initiative.

SEC. 20. RELATION TO OTHER LAWS.—The provisions of this Act are in addition to and do not in any manner limit or affect the provisions of any other enactment under which any remedy or right of appeal is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter. The powers conferred on the Ombudsman may be exercised notwithstanding any provision in any enactment to the effect that any administrative action shall be final or unappealable.

SEC. 21. APPROPRIATION.—There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Comment: The appropriations section must be shaped in accord with local practice and fiscal regulations. In some jurisdictions it need not be included in an organic statute like the one now proposed. In other jurisdictions a specific amount may have to be shown as the appropriation. If inclusion of an appropriation section is not absolutely necessary, its omission is recomended.

SEC. 22. EFFECTIVE DATE.—This Act shall take effect immediately.

[From the American Bar Association Journal, February 1968]

THE OMBUDSMAN'S RELEVANCE TO AMERICAN MUNICIPAL AFFAIRS

The ombudsman has been portrayed by some persons as a white knight who can eliminate municipal corruption and bring about near-miraculous solutions to persistent problems. Best forget about these ideas, Professor Gellhorn warns. But he declares that there are several possible advantages that might flow from the use of municipal ombudsman, and he specifies what they are.

(By Walter Gellhorn—Betts Professor of Law, Columbia University)

Creation of an ombudsman's office has been proposed in forty-seven of the fifty state legislatures and in numerous cities and counties. So widespread has the legislative discussion become that the National Conference of Commissioners on Uniform State Laws has begun consideration of a model law. Until now, only Hawaii has in fact adopted a statutory plan for an ombudsman (though even there the plan has not yet become operative). Still, the present extraordinarily broad and spontaneous interest in the ombudsman idea reflects a growing belief that this country needs some added means of handling citizens' dissatisfactions with official acts or failures to act. This belief gained fresh support in October of 1967 when the prestigious American Assembly concluded after intensive study that Americans should be able to ask "an independent high-level officer" to receive complaints, pursue inquiries into the matters involved and recommend suitable action.

Other countries—notably the Scandinavian—have successfully utilized just such a high-level officer, wholly independent of other officials and agencies, to serve as an external critic of public administrators. Functioning informally, expeditiously and without cost to the aggrieved citizen, the ombudsmen in those countries have used their impartial expertness to correct injustice, improve administrative practices and heighten confidence in the probity and good will of public servants.

Americans have become increasingly well informed about happy experiences with ombudsmanship in other lands. Among the Americans who are well informed are legislators. They are far too busy to be idly curious concerning exotic governmental institutions, but they sensibly realize that experience elsewhere may perhaps be relevant to specifically American problems.

This paper focuses on what experience abroad suggests concerning only one aspect of American administration. I do not intend to discuss what ombudsmanship might accomplish at the level of state or federal government. I wish only to outline what foreign experience suggests to me concerning local governmental affairs here. Chiefly, it suggests that I should not pitch my hopes too high. I declare at the outset that I am enthusiastic about transplanting the ombudsman system to these shores, but I do not for a moment think that the transplantation would create a transformation. An ombudsman would substantially adorn the American governmental scene, but he would not remake the scenery.

I

Without meaning to sound dejected, I begin with three strongly negative propositions.

1. Not long ago a civic reformer in a large Eastern city asked my help in drafting an ombudsman bill because, he said, his city government was corrupt from the sub-basement to the roof and he hoped to clean it. I advised him to forget the ombudsman. He needed a far more powerful detergent.

Wherever the ombudsman has been a success, he has been working within a system most people trust most of the time. In Guyana, where an ombudsman was created because of intensely divisive ethnic conflict, only one allegation of racial discrimination was filed during the appointee's first full year in office. That does not suggest a dramatic lessening of ethnic hostilities, but, rather, a disbelief in the appointee's sincerity or effectiveness. In Mauritius, which had resolved to activate the ombudsman system in 1967, no ombudsman has yet been named because nobody has been found in whom everybody has confidence. Now a search is afoot for a trustworthy foreigner who can be imported to fill the job—a search unlikely to succeed because few non-Mauritians speak the prevailing language, Indian Ocean Creole. In Tanzania, a one-party state, a three-man presidential commission appointed to be that nation's ombudsman has not won the faith of those who do not already have faith in the president and his monopolistic party.

An ombudsman, I conclude, can isolate mistakes: he can point out better pathways to goals that most right-minded people want to reach; he can suggest new applications of already accepted concepts. What he cannot do is compel unwilling officials to adopt an outlook that he himself has freshly dictated. If an American city has become habituated to corruption as its way of life, it had better turn first to a sweeping reform movement, not to an ombudsman.

2. My second negative proposition is this: An ombudsman will perforce leave untouched many of the things that most deeply irritate some elements of the citizenry.

Numerous complaints that now reach high public officials clearly pertain to policy choices. Should an area near a city remain rustic or should it be invaded by high-rise apartments? Should a treatment facility for narcotics addicts or a hospital for the mentally ill be created at all; and, if created, where should it be located? How should a new highway be routed when outdoorsmen object to one route, suburbanites to another and taxpayers to a third that would be far more expensive than the others? Should more (or less) money be spent on public schools, and should tuition be charged those who can afford to pay for a college education? Should food dispensers be subjected to stringent controls in the interest of public health? Should pollution of local beaches be abated by spending more money on sewage disposal? Assuredly these are important questions about which citizens are entitled to voice opinions and to be dissatisfied with the answers of public officials.

But the ombudsman is not the shaper of public policies. Nowhere abroad has he been a shortcut to judgment or, at the behest of the defeated, a reviewer of basic decisions made by political organs. Occasionally he can criticize the preliminaries to decision as, for example, the New Zealand ombudsman did when he castigated a department for inadequately informing the cabinet concerning the issues at stake; and he might be able to express an inconclusive doubt, as has the Danish ombudsman, that a particular policy choice is within the range of the

policy maker's authority. Still, when all is said and done, deciding the big issues at any level of American government is a political act in which an ombudsman will not share and which he should certainly never seek to displace.

Persons who advocate the ombudsman system because they think that "politician" is a dirty word they would like to expunge from the community vocabulary are badly self-deluded. No matter how expert he may be, no matter how much the public may respect him, an ombudsman can never be a substitute for the political processes that shape the community's choices and set the goals of its administration.

3. A third, somewhat related negative proposition is that the ombudsman cannot possibly be considered a super-administrator who will do a better job than, say, the mayor in superintending departmental activities.

During a six months' period in 1965 the mayor's complaint bureau in Buffalo received more than 5,000 complaints, chiefly concerning alleged shortcomings in municipal services or seemingly uneven exercises of municipal police power. They had to do with such things as removing trash from vacant lots, ending the nuisance of illegally parked cars, enforcing building ordinances and housing laws, repairing leaks in city water lines, repaving the streets and synchronizing traffic regulation devies. Anybody who hopes that an ombudsman will eliminate potholes in the streets, see to it that traffic lights work properly and arrange to have detritus regularly carted away from vacant lots is going to be badly disappointed.

In no foreign country has the ombudsman been a general supervisor of public services or of the public servants who render the services. He has been able to improve the operating agencies' methods for receiving, considering, responding to and acting on service complaints. In a few instances, because of repeated assertions to him that a particular agency has been too slow in replying to complaints, he has investigated the alleged dilatoriness. Sometimes, after investigation, he has reported his conclusion that the agency in question has been doing the best it possibly can with insufficient personnel. But an ombudsman's expressed belief that an operating staff needs to be enlarged in order to give satisfactory service is far different from an actual decision to increase the staff—and it is even further different from deciding that this pothole should be repaired before that one, this vacant lot in a slum area be cleaned up before the rich folks' garbage be removed.

I venture to guess that a municipal ombudsman would have to detach himself from the vast bulk of the substantive complaints urban citizens might wish to dump into his lap. Still, he might strongly decrease their future frequency. Time after time foreign ombudsmen have found that a word of explanation has dissolved a grievance. The same thing would probably happen here. A pertinent episode of apparent but unavoidable delay in removing a fire and health hazard in Buffalo is reported by Professors William H. Angus and Milton Kaplan of the State University of New York at Buffalo in a paper prepared for the American Assembly.

"Although numerous complaints had been received by various City departments about the structure in question, they went unacknowledged while the standard demolition procedure took its usual course. Some form of communication to the complainants that the matter was in hand would undoubtedly have gone a long way towards easing their fears concerning apparent City inaction to meet the abandoned building hazard in this instance. Undoubtedly the same holds true as a general rule where a time lapse necessarily intervenes between the filing of a complaint and governmental action to remedy it."

An ombudsman, in situations like this, might be able to teach municipal administrators the desirability of becoming politely prompt correspondents, but he will never teach them how or even whether to rearrange traffic signals, repair leaks in city water lines or remove automotive carcasses from the streets. A large city's police chief recently boasted that within twenty-four hours he could absolutely end illegal parking in his city. "Of course," he added thoughtfully, "I would have to assign every man in the force to that duty. We might then possibly receive one or two complaints about not performing other duties, I suppose." Deciding the proper order of priorities will continue to be the job of the department head and of the mayor, and the ombudsman will bring no comfort to those who wish that different priorities had been established.

II

Having now said that an ombudsman cannot do all things, I hasten to add that he can do some things—and that the things he can do are worth doing.

1. I begin with what is often mentioned last if at all, namely, his capacity to help the bureaucracy. The ombudsman system is usually advocated because it protects citizens against officials. In my opinion, officials need protection too.

Demands for municipal action are unrelenting in America. More and more services are sought. More and more regulation is sought, so long as it is regulation of the other fellow. Within the recent past, for example, energetic efforts have been launched to force New York City to impose restrictions on automobile mechanics, television repairmen and used car salesmen; "noise pollution" has joined water pollution and air pollution as a problem for which an official solution is demanded; fresh controls over homes for the aged have been advocated. Most public employees are decent, responsible people—at least, that must be the supposition of those who ask for additional governmental activity. Yet, at the very same moment that further public services are being urged, the general attitude toward public servants in American communities tends to be suspicious and hostile, if not downright contemptuous. A change is badly needed if good people are to be recruited and retained in the public service. The ombudsman system helps bring about that change.

Wherever an ombudsman has functioned, the citizenry's confidence in its employees has mounted. The ombudsman has acquitted as well as convicted; difficulties that had not before been publicly perceived have been explained persuasively; the ombudsman's existence has encouraged belief that grievances will be objectively explored, not callously ignored. In my judgment every ombudsman has helped create a climate of opinion in which good government has had a chance to become better government. Without faking his findings, he has built good will within the community.

He has helped officialdom in another way as well. He has given subordinate officials a forum to which they can bring grievances against their superiors. Civil servants comprise only a small percentage of the population in the five countries with measurable experience in ombudsmanship, but they and their organizations bulk large in the ombudsmen's work loads. Let no one suppose that American civil servants need no similar haven.

As an indication to the contrary, the United States Senate has approved a bill creating a Board on Employee Rights to protect 3,000,000 federal employees against unwarranted invasions of privacy. The Senate committee in charge of the bill characterized the existing grievance procedures as ineffective, cumbersome and time consuming and said that "the fearful tenor of letters and telephone calls from throughout the country indicates that employees fear reprisals for noncompliance with improper requests or for filing of complaints and grievances".[1] The availability of an ombudsman at the local level would afford protections where surely they are no less needed than in the federal public service.

2. The ombudsman can improve public administration by calling a higher official's attention to an episode of which he might otherwise never learn that reflects subordinates' inept discharge of responsibilities. Foreign ombudsmen's files contain an impressive number of cases in which corrective action was speedily taken by a superior officer who had not known about his staff's mistakes until the ombudsman had asked his opinion of what had been done. Legally, the complainant might have directly approached the administrative agency involved instead of the ombudsman, and possibly the result would have been equally favorable. Often, however, his complaint to the agency might have gone down the line instead of up. A nudge from the ombudsman is likely to move it upward. When that happens, a department head previously unaware of a deficiency is likely to make corrections gladly; most superiors know that subordinates' ineptitude rubs off on the superior's reputation. As the New Zealand ombudsman mildly observed in one of his reports, the matters coming to his office suggest that "in the lower ranks of a large department things can happen which are regarded as questionable when brought to the attention of the head of the department concerned".

Sometimes a constructive move can be made not only to correct the past error but to forestall future shortcomings by issuance or reissuance of general instructions, as has happened in New Zealand on many occasions. The bane of every

[1] S. Rep. No. 534, to accompany S. 1035, 90th Cong., 1st Sess. 32 (1967).

large organization is the unsuspected breakdown in internal communications; the boss who is aware he is being disobeyed can do something about it, but not even the most vigilant supervisor can supervise every movement of every subordinate in order to make sure he remembers or understands what he has been told to do. When the ombudsman is in a position to inform a superior about a seeming disregard of standing instructions, the superior may be willing to acknowledge that "someone goofed" while taking measures to avoid similar mishaps in other instances.

This is true as to matters of administrative policy and, equally, as to matters of administrators' personal behavior. Danish department heads, for instance, acting on information supplied by the ombudsman, have felt impelled at times to write letters apologizing for their juniors' bad manners even when their decisions were unassailable, and they have been at pains afterwards to give their subordinates some plain-spoken lessons in etiquette in order to spare themselves future embarrassments of the same kind.

In somewhat the same way the ombudsman can sometimes stimulate top officials to diagnose and pinpoint the causes of administrative delay or inefficiency. Few responsible administrators will close their ears to methodological advice given by a disinterested, highly qualified analyst of procedures.

3. The ombudsman's help with procedures is of two kinds. First, he points out how to minimize the risk of inadequately informed action. In general, the use of carefully designed, standardized methods will eliminate grievances about procedural unfairness and will aid administrators to reach acceptable conclusions. So every ombudsman has been a productive adviser about the sequence of steps—adequate notice, fair hearing, consideration by previously uncommitted personnel, formulated findings and so on—that are best calculated to conduce to sound results.

But the dividing line between a standardized method, which almost everyone praises, and unyielding bureaucratic rigidity, which almost everyone condemns, is not easily drawn in large organizations. So the ombudsman has been called upon not only to help design sound procedures, but also to suggest ways of preventing them from becoming uncomfortable straitjackets. This is no simple task, since departures from established rules make for lack of uniformity and may arouse complaints about discriminatory administration. The task must nevertheless be undertaken if procedures are viewed as means and not as ends in themselves.

4. Foreign ombudsmen have accomplished, perhaps in self-defense, a feat that many American municipal administrations have not adequately sought to achieve: the development of true review within the administrative agency itself. To an extent not wholly realized in this country, the opportunity for genuine appeals to higher level officials is limited. Informal applications to take a second look at a subordinate's decision too often fail to break through the tough self-protective hide most organizations, nongovernmental as well as governmental, tend to grow. As the New Zealand ombudsman has well said, "The first decision, even if made by delegation or in the ordinary course of administration at a relatively low level, tends to generate its own defences within a Department—a process of rationalization can generally bring out arguments in favour of the original decision that may not have been known to the person who made it." The process is intensified when, as often occurs, informal complaints are referred by superiors to the very same subordinates who made the initial decisions.

Refinements of internal appellate methods are highly desirable from the standpoint of the affected citizenry, of course. They are desirable, too, from the standpoint of the ombudsman because they sharply reduce the number of persons who feel they need his help. In Norway, where departmental review of rejected social security claims is no doubt conscientious but conducted in ways mysterious to the disappointed claimants, the ombudsman has had a heavy case load under the heading of "social affairs". In Sweden and Finland, where the appellate processes in the nearly all-embracive social security systems have been strongly and clearly structured, the ombudsmen receive only a few complaints under that heading. The Norwegian ombudsman is not likely to overlook the conclusion to be drawn from his neighbors' experience. He will probably encourage the administrators of social affairs to develop an appeals mechanism that will satisfy many claimants who now doubt the adequacy of departmental processes.

5. A person who feels aggrieved by an official action or failure to act is not deeply interested in a general toning up of public administration. He wants satisfaction here and now in his own case. Obtaining what he wants will restore his faith in government far more than will an assurance of improvements that may forestall mistakes affecting his fellow citizens. The ombudsman can, indeed, often help satisfy the complainant's present desire. Candor requires recognition, however, that this does not occur as frequently as enthusiasts for the ombudsman system believe—partly because complainants' desires are often discordant with public policy and partly because the ombudsman really is not a miracle worker.

Still, satisfaction results often enough to be noteworthy; and it occurs, too, in matters that may seem large to the individuals immediately concerned though lacking in the drama or the dimensions that would bring them to public notice. The world will little note nor long remember that the Danish ombudsman advised prison authorities to let convicts purchase powdered coffe for use in their own cells; or that the Norwegian ombudsman persuaded an official to allow a craftsman to retain an expired license certificate he desired to frame for reasons of sentiment; or that the New Zealand ombudsman influenced the Marine Department to relocate a water ski lane that imperilled swimmers in a certain area; or that the Finnish ombudsman obtained a refund of a fine imposed upon a defendant for not appearing in response to being summoned for a trial which occurred while, unbeknownst to the local court, the defendant was languishing in jail elsewhere; or that the Swedish ombudsman aided a young woman who insisted upon exhuming her father's bones so that they could rest in the family burial plot. The persons who were involved, though, will certainly remember—and be grateful. Singling out picayune examples should not suggest that everything an ombudsman accomplishes is picayune; but an ombudsman's caseload reflects life, and life is made up chiefly of small incidents rather than major events.

Two limitations upon an ombudsman's probable effectiveness in this country deserve to be noted in this context. First of all, an ombudsman does not function as a trial court. When contested issues of fact arise concerning episodes not reflected in paper files, an ombudsman will be unable in most instances to say where the truth lies. He can give advice about avoiding similar controversies in the future, but he cannot confidently re-create the past when the complainant's version of the facts and the complained against officials version are irreconcilable.

As an example, he will be unable to adjudge the validity of most accusations of police brutality or other misconduct unless the police admit their truth. What he can do—and should do—is to see that accusations are fully and fairly investigated by superior officials of the department concerned, and that proper supervisory steps are taken to safeguard against improprieties in days to come. He cannot readily conclude, for instance, that handcuffs were needlessly slapped on an arrested person who says he was docile but whom the arresting officer describes as having violently resisted arrest. The ombudsman can, however, see to it that the police commissioner issues suitable instructions for the guidance of future arresting officers. This may in the end make for better police practices, but it gives little solace to the man who had voiced the initial complaint.

This point needs stressing because too many persons think that an ombudsman will replace other disciplinary mechanisms. The reality is that genuine trial proceedings are outside the scope of the ombudsman's work. His job is not to supersede other responsible officials, but to see that others do their jobs completely and justly, without a predisposition toward white-washing their subordinates' sins. The ombudsman's doing the job that is his will not bring complete satisfaction to grievants who want the ombudsman to do somebody else's job as well.

The second cautionary note here is that American custom frowns on giving away cash in order to soften a complainant's sense of outrage about an official dereliction. As a matter of fact, American federal, state and local governments have been far behind other countries in accepting financial responsibility for public servants' errors in judgment or action. Local ombudsmen will be far less able than their foreign counterparts to repair individual injustices if they cannot recommend small monetary settlements in appropriate cases.

The Swedish ombudsman, for example, has successfully recommended payment to a man who had undoubtedly been maltreated by policemen, though the particular offender or offenders could not be later identified; and in the same way he has recommended compensation for persons whose detention in a mental institu-

tion had been found to be illegal. Acting upon a civil servant's complaint, the Danish ombudsman has proposed suitable redress for a wrongful disciplinary action. Conceivably, in this country, an action at law might be maintainable against a city in cases like those just outlined, but the proceedings would be difficult and the outcome highly uncertain.

The New Zealand and Norwegian ombudsmen have gone much further in recommending "ex gratia payments"—payments that simply reflect a generous exercise of discretion rather than recognition of a potential legal liability—and their recommendations have been a strongly humanizing force in public administration. An American municipal ombudsman might have less capability to act in this manner because most cities, having wrapped miles of red tape around their cash drawers, have made discretionary payments nearly impossible.

6. An ombudsman system, if foreign experience can guide American judgment, is likely to bring grievance machinery within the reach of persons to whom more imposingly formal means of redress are uncongenial. Abroad, ombudsmen's "clients" are drawn from the entire range of the citizenry, but they come from the highly organized and secure elements of the population far less frequently than from the relatively isolated and unaffluent. American urban society especially needs an accessible tribune of the small people, precisely the ones who have most actively used ombudsmen elsewhere.

Although data concerning the sources of complaint to American political personages are too fragmentary to permit confident conclusions, they tend to support an impression, gained from reading Congressional mail files, that administrative grievances lodged with legislators are expressed mainly by the middle class. Moreover, distaste for trial-like hearings and other "legal" procedures is especially marked among the poor, who therefore have not readily seized opportunities to gain formal review of unsatisfactory administrative determinations. This distaste may perhaps be overcome in the course of time, with the broadening availability of legal services needed by the indigent. Until that has happened, however, a cheap, approachable and, above all, self-propelled investigator of grievances would fill a gap in the present protective wall against official abusiveness or ineptitude.

7. The bigness of cities begets impersonality. It also begets uncertainty about how to get things done. Cities are not as heartless or ruthless as they are reputed to be, but most people are ignorant of the services available to them within the municipal complex and so they simply assume that the services do not exist. Ombudsmen abroad have been important givers of information and they have also been active mediators on behalf of resourceless persons who have asked their help. No doubt local ombudsmen in this country might find themselves similarly importuned to be all-purpose handymen.

Without tight jurisdictional definitions, however, a strong effort should be made to keep a clear focus on grievance handling as the ombudsman's job. American cities populous enough to need an ombudsman probably also need a counterpart of the English and Japanese citizens' bureaus which furnish information, give advice and extend a helping hand in connection with just about any perplexity that may beset an individual. As Professor Alfred J. Kahn has remarked of the English bureaus (and the same is true of the Japanese), their "services are not limited to the poor, the uneducated or the maladjusted. The assumption is that in a complex bureaucratized society any citizen may require information, guidance, advice, application forms or explanatory pamphlets . . . The real issue is to devise a system . . . that will humanize the urban environment because of the general alienation of people from government."[2]

Under Professor Kahn's leadership an admirable study of what he calls neighborhood information centers has been completed by the Columbia University School of Social Work. The study shows convincingly the unfilled need for conveniently located service agencies, less engaged in righting wrongs than in, simply using existing know-how to help attain desired results.

Although ombudsmen can do and have done a great deal along this line, they should not be diverted to this time-consuming work. Preliminary exploration of difficulties can be undertaken by or under the guidance of a neighborhood service agency, leaving to the ombudsman the task of considering grievances that remain unresolved after negotiatory efforts by others have failed.

8. What has just been said suggests the further important observation that the ombudsman system excludes no other avenues to citizen satisfaction. In

[2] Quoted in GELLHORN, WHEN CITIZENS COMPLAIN 157 (1966).

every country that has had a national ombudsman, complainants have remained altogether free to go to court, write their legislative representative, use political influence, resort to formal administrative remedies or take any other step they might think best suited to their particular problems. The ombudsman has not supplanted, but has supplemented.

When discussing the possible utility of an ombudsman in an urban setting, one need not contend that the ombudsman will produce happier results than anyone else possibly can. It suffices to say that he may be able to add to the sum total of happiness, not as a competitor against others who now concern themselves with governmental operations, but as their collaborator.

III

Does the ombudsman's success abroad plainly persuade that equal success would occur if an ombudsman were appointed in an American city? I myself am persuaded, but I cannot truthfully say that the answer should plainly be the same for all. The chief accomplishments of foreign ombudsmen have been at the level of national administration, usually well structured and strongly professional in spirit. Municipal administrations in this country do not invariably exhibit those qualities. Whether an ombudsman who possesses only the power of rational persuasion would be able to communicate effectively with local civil servants and political appointees has not been clearly established.

The uncertainty on this score—an uncertainty, I say again, that does not give me qualms—would justify experimentation with other means of grievance handling. Added machinery of some sort seems plainly needed in most large communities. Those who doubt that the ombudsman system would fill the need should cast about for something else that will in their opinion more effectively heighten governmental response to individual complaints. This has occurred here and there. St. Louis to seize on one current example, has recently set up a central complaint bureau as an immediate adjunct of the mayor's office and, simultaneously, has approved a plan for retired business and professional men to act as impartial observers during police department investigations of civilian complaints against officers.

Whether these steps will build citizen confidence in the city's government cannot be foretold in advance of experience. I see nothing to be lost and much to be gained by localized experimentation. The superiority of the ombudsman system is not so indisputable as to justify dogmatic insistence upon its country-wide acceptance to the exclusion of all else.

What I do deem to be indisputable, however, is the desirability of moving ahead—preferably, in my view, toward an ombudsman, but in any event in that same general direction. As Professor Robert Fogelson's recent masterful study of the disastrously style-setting Watts riot of 1965 has shown anew, one of the most searing urban discontents is widespread belief that citizens' grievances are not now being seriously evaluated. Changing that belief ought to be a major goal of all Americans. Creating a truly independent ombudsman could powerfully reshape public opinion. Nothing we can learn from abroad causes reservations on that score. In all five countries with substantial experience in this field, citizen confidence in governmental processes has been raised by the mere existence of the ombudsman.

Despite genuine enthusiasm for the ombudsman idea, I close on a renewed note of caution. The ombudsman will not overcome what Professor John E. Moore has called "the hypochondria of the body politic". He will not reshape urban social and economic patterns. He will not create jobs, build homes, improve public schools, destroy organized crime, clean up the parks, strengthen the mass transport system or eliminate rats, smog and marijuana. Taking care of grievances about maladministration will leave untouched the deeper problems we Americans must solve if we are to live happily ever after.

But let us at least try in a civilized way to take care of the grievances, while remembering to attack the other problems as well. If medical research were to develop a treatment of asthma better than any now known, would anyone delay using it because it did nothing to alleviate lung cancer and tuberculosis?

THE MEXICAN "AMPARO" AS A SUPPLEMENTAL REMEDY FOR THE REDRESS OF CITIZEN GRIEVANCES IN CALIFORNIA—JANUARY 1967, INSTITUTE FOR LOCAL SELF GOVERNMENT, CLAREMONT HOTEL BUILDING, BERKELEY, CALIF., RANDY H. HAMILTON, EXECUTIVE DIRECTOR

"Administrative tyranny is self-generating. Inevitably, each new program arms administrative agencies with more money, more authority, new rules and regulations extending over wide areas of citizen activities."—Sam Ervin, U.S. Senator, 1966.

". . . when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."—John Milton, 1608-74.

PREFACE

In October, 1965, the Board of Directors of the Institute for Local Self Government authorized a study of the redress of citizens grievances in California's urban areas. In April, 1966, under a grant from the Stern Family Fund we commenced research and related activities to inventory procedures for dealing with citizen grievances. The major emphases of the project are—

An inventory of present practice (or lack of practice) in seventeen cities over 100,000 population and twenty of the state's largest counties as well as significant procedures elsewhere in the state;

An analysis of shortcomings and successes as a basis for defining new procedures and the draft of suggested ordinances and administrative reorganizations;

The promotion of recommendations through conferences, publications and the normal channels of communication to the constituency of the Institute (elected and appointed officials of local government in Califronia).

The effort is directed toward easing an increasingly sore spot in urban areas arising from the grievances felt by many people as a result of the action, or inaction, of government agencies. The dominant motif of "go fight city hall" is indicative of a lack of effective methods for redressing grievances. This makes for frustration, bitterness and unrest which, in turn, causes troublesome administrative situations for local government and creates an atmosphere that adds to the already monumental difficulties of establishing effective improvement and service programs. The project brings to bear serious, systematic, concerted attention to a major governmental problem in the belief that the ultimate recommendations and solutions proposed for local governments in the nation's most populous state will not only be of assistance in California but be visible enough to provoke national notice.

This publication deals with the Mexican Amparo, one process for the redress of citizen grievances which should be considered as California gropes for methods to redress citizen grievances, the lack of which may create vexing and socially disruptive situations for local government. It is the second publication of the project's series, the first being *A Preliminary Inventory of Selected Administrative Procedures for the Redress of Citizen Grievances in California Urban Areas*, the Institute, September, 1966.

INTRODUCTION [8]

A hallmark of public administration in this century has been the extension of government responsibility for the provision of new services and engagement in new functions. The growth of new services and responsibilities has added large new dimensions of local administration which directly affect the lives and property of the individual in a manner and on a scale not previously prevalent. An increasingly large number of discretionary decisions are being made (or are not being made) by local government affecting the rights and interests of citizens.

[8] The background material for this publication is from a working paper by attorney Manuel Ruiz, prepared for the Conference on the Redress of Citizen Grievances in California, Los Angeles, September 1966. The Conference was conducted by the Institute for Local Self Government as part of its research and allied activities under a grant from the Stern Family Fund. The Institute of Governmental Studies, University of California, Berkeley, was session co-chairman. The additional material was prepared by the staff of the Institute for Local Self Government from supplemental research, and correspondence with Dr. Filipe Tena Ramirez, former Judge of the Supreme Court of Mexico.

Government's decisions and government agencies now affect the lives of people in ways not envisaged when the structure and administrative procedures of local government were being developed in the United States and California.

The unending conflict between liberty and authority has intensified. The area of rights without remedies is broadening. This being so, procedures for the redress of citizen grievances become of looming and extraordinary importance.

The problem is not one of civil rights. Properly understood, it is one of most urban administrations not being sufficiently aware of, much less structured and organized to provide simple, orderly, inexpensive, widely-known processes for the redress of citizen grievances in keeping with justice and equity where administrative agencies execute a myriad of regulations. The problem is to counterbalance the despair of the individual in his confrontation with the unyielding monolithic public agency which may be following perfectly legal procedures and still treat citizens unfairly because its monopolistic position allows it to ignore individual plaints. Unhearing, the bureaucracy can be unthinking and unfeeling.

Imperfections exist in the operation of present institutions dealing with the redress of citizen grievances. There is a need to improve democratic processes for adjudicating accusations of noncriminal administration. The current interest in this matter is but an episode in the far greater and longer struggle of mankind to convert the *polis*, the Greek city-state, into Cosmopolis, the city neither of the Athenians nor of the Romans, but of the human race, the city in which men at last may resolve the riddle of liberty under law.

Folklore has it that "you can't fight city hall." In a democracy this is intolerable. The paradox is that urban government, supposedly closest to the people, has perhaps become most alienated from many of them. "There is a basic incompatibility between men and the metropolis. As we build huge metropolitan areas we risk losing our individuality. To reduce the incompatibility we must hold on to the bigness, apply it in a decentralized fashion and enlarge the role of the individual. Fighting city hall is one way in which the individual can become compatible with the metropolis." [4]

Fiscal, spatial and activities programs of state and local government are so interwoven as to undeniably affect the whole of the social, economic and cultural mileu of the urban resident. It is imperative that Homo Civitatas not be alienated from the mechanisms that were designed to enable him to manipulate his environment—not be dominated by it. A primary purpose of the city is to foster and enhance the development of its individual citizens. "A primary function of community leadership is to translate legitimate protest into workable programs by correcting the basic conditions which have led to protest and develop the latent potential of the human resources crowded within our communities." [5]

The matter is of concern not just to the academe but to the practicing administrator. There is widespread interest in the bill, AB 2956, introduced by Speaker of the California Assembly, Jesse Unruh, to create a state office of *Ombudsman*. Speaker Unruh, like Deputy-mayor Costello, an operating official, has characterized our failure to develop any meaningful oversight of the administration of government as our "most extreme example of institutional lag." [6]

There are several areas where the grievance mechanism can be considerably improved. Some of the broadest categories of need (among others) are:

Complaints against discretionary decisions wherein the citizen disagrees with the matter in which an official has exercised his discretion but has no formal means of challenging it; or, at least, inexpensive means. The complaint in these cases is generally not that of the official abusing his power, but that the decision reached is not, in all circumstances, appropriate. There may be no allegation of bias, negligence or incompetence but merely the charge that the decision is misguided. In essence, this type of complaint is one that has not a right of appeal to an independent body which can substitute its discretionary decision for that of the official who made the original one.

Grievances against acts of maladministration, in essence not a question of appealing from but of making an accusation against an authority.

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[4] Costello, Timothy W., Deputy Mayor of the City of New York, remarks, Manhattan College, April 16th, 1966.

[5] Anderson, Desmond L., "Developing Community Concensus", *Public Management*, International City Managers Association, Chicago, March 1966, p. 62.

[6] Unruh, Jesse M., remarks, Institute for Local Self Government, Conference on the Redress of Citizen Grievances in California, Los Angeles, September 15, 1966.

In new and previously unperformed functions, there is an absence of settled case law and only vaguely applicable common law. Few people, most of all the underprivileged, know what their rights or obligations are. In the absence of progressive state legislation or good case law, there often exists inadequate or inappropriate mechanisms for appeal against real or alleged grievances. There is thus not only an "institutional lag" referred to by Speaker Unruh and Chancellor Alexander Heard, but what we call a "grievance gap" particularly as applied to the newer functions of urban government.

Under today's urban conditions, large masses of our population cannot obtain redress for many of their grievances (real or imagined) from the "three great writs" of American jurisprudence or traditional redress mechanisms. These are complicated, time and money consuming procedures. "Too often, the poor man sees the law only as something which garnishees his salary; which reposses his refrigerator; which evicts him from his house; which cancels his welfare; which binds him to usery; or which deprives him of his liberty because he cannot afford bail." [7]

The "complaint window" found in some city halls is perhaps more suited to matters such as holes in the street or infrequency of garbage collection. It is doubtful if it is appropriate to the nature of many current citizen grievances in urban areas. The "complaintmobile" mentality no longer fits modern urban life. Essentially, the system for redressing citizen grievances and handling complaints needs to be updated "offering the individual citizen protection against the bigness that has swollen executive and administration functions." [8]

We may be so blinded by the virtues of our system of common law that we have not perceived the appearance of novel forms of injustice for which existing jurisdictions and procedures of adjudication are inadequate. Urban governments operate complex governmental programs based on legal machinery more appropriate to the simple agrarian society of old England from which we inherited our common law base.

The current cry for non-judicial civilian "review boards" over police authorities is symptomatic of the condition, *but only that.* An official or a process with capability of examining the whole range of administrative decisions holds more hope for the future "than does a special tribunal for trying citizens' complaints against individual policemen." [9]

Senator Edward V. Long summing up 1642 pages of evidence gathered by a Senate Judiciary subcommittee said: "It is terrible to contemplate, but we are permitting practices by the bureaucracy which, left unchecked, have resulted in police states in other countries."

More temperately, perhaps, Professor William A. Robson of the London School of Economics has said that the faults of bureaucracy which give rise to citizen grievances and which are of most frequent occurence are:

". . . excessive sense of self-importance on the part of individuals or an undue idea of the importance of their offices; an indifference toward the feelings or the convenience of individual citizens; an obsession with the binding and inflexible authority of departmental decisions, precedence, arrangements or forms, irrespective of how badly or with what injustice or hardship they may work in individual cases; a mania for regulations and formal procedure; a preoccupation with particular units of administration and an inability to consider the government as a whole; a failure to recognize the relations between the governors and the governed as an essential part of the democratic process."

The Mexican Amparo as a supplemental remedy for the redress of citizen grievances in California and the Southwest is not without relevance to the search for simple, inexpensive, orderly, well-known, widely-available, easily understood and widely applicable citizen grievance procedures.

Amparo is, in fact, within the tradition and history of California and was known and used here prior to the Constitution of 1849. Much of California law continues to be based on the laws of Mexico. The Supreme Court of the United States has repeatedly held that the laws of a prior country or sovereign are part of those of the United States and of which judicial notice can be taken. The laws of Mexico prior to the Treaty of Guadalupe Hidalgo in 1848, therefore, and until

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[7] Katzenbach, Nicholas deB., remarks, National Conference on Law and Poverty, Washington, D.C., June 1965.
[8] New York Times, Editorial, November 10, 1966.
[9] Gellhorn, Walter, "Police Review Boards: Hoax or Hope," *Columbia University Quarterly,* Summer, 1966, Columbia University, New York City, p. 10.

changed by the State of California have continued to be the laws of California.[10]

Until 1880, California was bi-cultural. Its laws were written in both Spanish and English, statewide official proceeding were carried on in the same fashion. Many of the authors of the first California constitution were Mexican-American Californians. The Proclamation of General Riley was based on Mexican law and the Spanish, Roman and French laws which were in force under the Mexican regime became part of those of California.[11] Amparo processes would be quite in keeping with this tradition.

Amparo was created to protect the individual citizen in his fundamental rights, including his dignity as a person before the bureaucracy; and, against injudicious, illicit or capricious procedures and actions by authorities invested with power and command. Its object is to protect the individual against arbitrary action by public authorities. Wherever a guaranteed right of the individual is to be found, the Amparo process is there to protect it.

Administrative actions in Mexico are subject to review before judicial authorities or annulment proceedings before the Fiscal Tribunal. But, there still remains a vast range of administrative activity in which disputes arise, individual rights may be trampled and bureaucratic decisions aggrieve citizens. It is precisely in the areas of greatest administrative discretion that there comes into play the Mexican process of Amparo. In so doing, it offers an incisive and applicable protection against what Kenneth Culp Davis has called "the enormous mass of substantive law produced by the agencies," most of which is beyond the understanding even of lawyers.

Because lawyers are little better than anyone else in understanding the technical rules and regulations that dominate our lives they must leave the substantive law out of what they interpret as administrative law. Amparo processes provide protection within a comprehension of the seemingly obvious but mostly overlooked fact that an agency may do things that are wrong, but if it does them in the right way, administrative law is satisfied. Our current redress processes find it difficult to proceed against "proper" procedures. *Amparo* overcomes this anomaly by considering procedure. Consequently, it suggests great utility as a supplementary redress mechanism.

The characteristics of the Amparo process may be summarized as follows:

(1) Amparo is a legal proceeding before Federal judicial authorities;

(2) The plaintiff is always an individual;

(3) The defendant is always a public authority or agency accused of committing or contemplating the commission of actions or decisions in the exercise of public power which imperil an individual's rights;

(4) The plaintiff may institute Amparo processes *before* a public authority takes an action or makes a decision which threatens or imperils his rights as a person vis-a-vis the public authority by alleging facts of "imminent danger;"

(5) The plaintiff may institute Amparo processes no later than fifteen days after a decision or action is publicly known which is alleged to be grievous to whom an individual notice must be brought;

(6) The action may be brought in person, through an attorney or by telegram to a court of competent jurisdiction;

(7) The lodgement of Amparo processes has the legal effect of maintaining the status quo ante the action or decision of the public authority complained against;

(8) The petition is always on behalf of an individual and the decision of the court must always inure to the exclusive benefit of the individual concerned;[12]

(9) Judgment is to prevent or make good the specific violation complained of;

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[10] The community property laws relating to marriage were taken from Mexican law. Our water laws and riparian ownership rights were taken practically en toto from Mexican law as were rules, techniques and customs relating to mining as well as important other areas of substantive and procedural law.

[11] California and Texas are, of course, the only two states that have been admitted to the Union without having had previously an organized territorial government. In view of the present minority status of Mexican-Americans, many of whom are among those aggrieved by actions of today's bureaucracies, it is interesting to note that while the bi-lingual status prevailed there was more leadership in all levels of government and more citizen participation in the governmental processes by Spanish speaking Americans than is now the case. Both cultures were complementary. Neither was considered a sub-culture.

[12] In Mexico, as in the United States, a corporation is legally considered to be "a person."

(10) The procedures are brief, uncomplicated, simple and inexpensive;

(11) It is not necessary to exhaust statutory administrative remedies before commencing the Amparo process;[13]

(12) It is a process applicable against an administrative act where the law makes no provision for the suspension of the act complained of pending settlement of the dispute;

(13) Because the process applies to a particular individual in a particular situation, the remedy is for that particular case and *stare decises* does not follow;

(14) In the Amparo process, a person does not have to act *in propria persona* inasmuch as the remedy stems from the Constitution of Mexico and requires a statement of law and fact;

(15) Amparo processes lie against all administrative and executive authorities, at any level of government, without limit or exception.

In countries which follow the English juridicial tradition, there is a general rule that all ordinary and other remedies must be exhausted before there can be recourse to special ones. In Mexico, when a fundamental human right is involved in the action of the bureaucracy, the aggrieved citizen is not required to have recourse to ordinary actions.

Amparo is designed to protect citizens from the despotic potentials open to bureaucrats as they administer, as well as against impersonal disregard that may occur in public administration. Because of its roots and the cultural antecedents of many of our citizens, Amparo processes should be widely understood. The search for citizen's protectors should not be exclusively among the eggs in an Ombudsman's basket. Current concerns for the necessary legal and administrative parturition indicate a necessity for greater understanding and information about alternative and complementary redress mechanisms. Our research could find no previous educational publication in English devoted solely to the Amparo. As a supplemental remedy for the redress of citizen grievances it is worthy of considerable debate. It is the purpose of this publication to provide the basis for that.

HISTORICITY OF AMPARO PROCESSES AS PROTECTION AGAINST GOVERNMENT ACTION

Basically, Amparo processes are an effective judicial check on the constitutionality, propriety and legality of acts of public authorities. It is Mexico's method of preventing public officials from treading on the rights of individual citizens when discharging official duties in executing government programs or providing public services. It is a way in which little man confronts big government.

The sources of Amparo are the subject of controversy. It is possible to trace it back to Roman law, to see its origins in the law of Aragon or in colonial law, or to connect it with *habeas corpus* or the constitutional law of the United States. Mr. Benjamin Laureano Lune of the International League for the Rights of Man contends that Amparo processes were known in Mexico before the era of Columbus when "there were courts that issued their judgments in accordance with the law evolved by custom and experience which protected the citizenry against any acts by the authorities in violation of the principles of personal status."

America's leading writer on the redress of citizen grievances, Walter Gellhorn, has aptly said: "Although current, the problem itself is far from having been freshly discovered. Nor is it the sole concern of countries that count themselves 'modern' or 'enlightened.' Every social grouping, no matter how primitive, maintains channels through which questions and complaints flow."[14]

The only conclusion to be drawn from attempting to trace Amparo's lineage through centuries is that a similarity exists between institutions, which, although unknown to each other, pursue similar ends.

In modern times, Amparo as a means for the redress of citizen grievances in Mexico was inspired by Alexis de Tocqueville's *Democracy in America*, in its 1836 Spanish translation from the original French, by Sanchez de Bustamente. The Mexicans of that time were not familiar at first hand with the system of constitutional protection of individual rights in the United States. They could not, therefore, directly adapt that system. Taking as their basis the information

[13] This concept from Mexico later finds its way into the 1948 UN General Assembly *Universal Declaration of Human Rights*, as Article 1: "Everyone has the right to an effective remedy by competent tribunal for acts violating the fundamental rights granted to him by constitution or law."

[14] Gellhorn, Walter, *Ombudsman and Others*, Harvard University Press, Cambridge, 1966, p. 1.

contained in *Democracy in America*, which was as succinct as it was persuasive—they set about inventing a system in which they utilized the essential ideas provided by de Tocqueville for the protection of aggrieved persons. While his comments to manage successfully. That scheme of society is more dependent than interpretation of statutes the Mexicans utilized the concept for the protection not of the Constitution, but of the individual's constitutional rights before the bureaucracy. This deviation invested the Mexican institution with a definite measure of originality.

A constitutional democracy is perhaps the most difficult of man's social arrangements to manage successfully. That scheme of society is more dependent than other forms of government on knowledge and wisdom and self-discipline for the achievement of its aims. Democracy implies the reign of reason on an extensive scale. It requires not merely the need for effective power but, if a democratic society is to be at once cohesive and civilized, there is also the need for limitations on the power of those who govern or administer the programs of government.

The abuse of power does not come in a day. It comes, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. For this reason the remedy of Amparo was written directly into the Constitution of our sister Republic of Mexico, as a supplementary remedy for the constitutional protection of individual rights. It acts to restrain abuse from arbitrary governmental authority in the protection of basic, individual constitutional rights.

The Republic of Mexico has had more than one hundred years of experience in the kind of administrative state which we in the United States have entered into but recently. The Executive Branch in Mexico is all-pervasive affecting almost every local activity. Its administrative agencies and boards on the executive level are directed principally by political appointees. Without the remedy of Amparo, there would be no speedy redress or way for a citizen to enjoin arbitrary and abusive intrusion and action by those who administer the laws. It is applied against overbearing and coercive actions of the authorities. Mexican legal doctrine distinguishes between acts of *imperium* and acts of a different nature. Amparo was not granted against the latter. The increasing intervention of the State in social life in recent years invested additional functions to the historical Amparo with increasing operational and functional importance in administrative law and in ameliorating citizen grievances occasioned by administrative disputes.

The Constitution of the United States originally concerned itself primarily with the machinery of Government, and after this "greatest of all instruments ever struck off by the hand of man" was adopted in Convention, it was discovered that the individual as a human being had been somewhat forgotten. The Constitution of the United States was then amended ten times, and there emerged our "Bill of Rights," the major purpose of which was to protect the ordinary citizen from the sovereign's coercion.

The individual as a distinct person possessed of freedoms and personal rights is needful of timely protection from violations by governmental commissions, agencies, and other instrumentalities be they local, municipal, national or statewide in scope and function. Remedies and processes which protect the individual citizen who may have a valid grievance occasioned by actions of government authority are still being studied. Our present remedies for redress are and should be continuously inventoried to discover flaws, suggest improvements, note patterns of common elements of success and failure and come forth with a set of principles common to viable mechanisms for redress of grievances. These should be put into legal and administrative phraseology and propounded for consideration and adaptation into the law and administrative procedures by the state and its political subdivisions.

THE AMPARO PROCESS—WHAT IT IS AND HOW IT WORKS

The Amparo process is one supplemental judicial remedy for the redress of citizen grievances that is deserving of more American study than has so far been accorded to it.[15] According to the decisions of the Mexican Supreme Court

[15] "Mr. Katzenbach (United States of America) said that . . . in his opinion the best form of control was judicial control over the acts of the executive. The essential need was for effective control over the application of the laws by public officials." *Seminar on Amparo, Habeas Corpus and Similar Remedies*, Mexico, D.F., August 15–28, 1961, United Nations (ST/TAO/Hr/12,) New York.

it is an "extraordinary constitutional remedy" (remedio constitucional extraordinario). *Fundamentally, it is a writ granted by a Federal court to restrain or enjoin action as against any decision of an administrative authority exercising governmental powers—federal, state, or local*—in Spanish "Autoridad." It is based on a simple statement of facts, much after the fashion of motions in our courts of law. It is an individual and personal right of action and, therefore, cannot be brought on behalf of third parties in a representative suit.

This does not mean that a person must assert his remedy *in propria persona.* In most instances, the aggrieved citizen is represented by an attorney inasmuch as this is a remedy which arises directly from the Constitution which requires a statement of law and fact.

The Amparo process comprises four stages: (1) submission of the application, (2) call for reports from the responsible administrative agencies, (3) constitucional hearing before a Federal district court, (4) decision. In very serious cases, there is an additional way of correcting deficiencies where it appears that the rights of an individual, as a person, have been violated. This is the so-called interlocutory application for suspension of the administrative action or decision, in Spanish "incedente de suspencion." This can be submitted together with the application for the Amparo process in cases of extreme urgency or "imminent danger" and the matter can be decided immediately, if necessary by telegram.

Inasmuch as the constitutional rights of a specifically aggrieved person are involved, it is asserted in the Amparo procedure that an individual right has been violated. If the decision of the Court states that a particular person's individual right or freedom has been violated that decision cannot be used as a precedent for other cases, under the doctrine of *stare decises*, as in administrative law in the United States. This characteristic of Amparo encourages judicial tribunals to grant speedy remedies for the *particular case*, to protect the aggrieved party involved, without qualms by the Judge fearful of having to be bound by or grapple with the moral problem of whether the particular decision is going to be sweeping and affect a multitude of other persons. Amparo decisions are not held to enunciate a general statement or principle of law.[16]

Since the remedy of Amparo is written directly into the Mexican Federal Constitution, the action or motion is to a Federal District Court Judge. The defendants, who are referred to as the Responsible Parties "Autoridades Responsables", are always Federal state or local instrumentalities. None are beyond the reach of Amparo. It applies to all administrative agencies without limit. A necessary party to the action, and named in it by the aggrieved party, is the Federal District Attorney. Third parties whose rights may be affected may be named and brought into the action by the aggrieved party, or they may independently intervene as parties to the action if their rights are directly involved.

Amparo is not referred to or called a civil action or civil proceedings. It is differentiated from a civil action. The proceedings are called a "Constitutional Action" (accion constitucional).

The specific object of an Amparo is to maintain the "status quo," by a temporary restraining order. It places the parties where they were prior to the announcement of the bureaucratic decision, administrative action or intervention of the authority whose action has been restrained and against whom the grievance is brought. It is without prejudice to the rights of the aggrieved person to obtain, after a full hearing, a permanent injunction or mandate. The individual rights of the aggrieved person which are protected arise from his constitutional guarantees.

The restraint is sought and Amparo will hold against (1) the "abuse of power;" (2) the unconstitutional enforcement of a law; (3) against a valid law which is being enforced in an unlawful manner; or, (4) where there is an absence of procedural due process. Individual rights are those of life, liberty, and property, their quiet pursuit and more importantly, their protection.

Individual rights are referred to by the Supreme Court of Mexico as "human rights." [17] These are set forth in Article 103 of the Mexican Constitution. Corpora-

[16] The danger of sweeping generalizations has occasioned confusion in California. State District Courts of Appeal sometimes come to opposite conclusions under similar statements of fact, followed by the aggrieved parties insisting that the conclusion which supports their case is the one which must be followed under the rule of *stare decises*. This is one of the unstated reasons that not all appellate decisions are now being printed, as formerly was the case.

[17] *Mexican Supreme Court Decisions*, Tomo XIV, p. 63.

tions are considered as persons possessed of individual rights, as are the various states of the Mexican Union in their proprietary capacities. The Federal Government itself, however, does not have the remedy of Amparo available even in its proprietary capacity.

AMPARO REMEDY NOT INTENDED TO VACATE LAWS

The purpose of the Amparo is to great immediate relief to a specifically aggrieved party. In an Amparo proceeding the Court is without power to declare as unconstitutional a general law, with one exception hereinafter referred to as to a "class" of individuals.[18] If the general law, however, is self-executing and results in sanctions immediately and pecuniarily affecting an individual of a specific class in his property or personal rights, the self-executing portion of the law as it affects the aggrieved party is suspended and enjoined. The aggrieved party or parties must show injury or peril, imminent or present, under the general law, or an order issued pursuant to said law, otherwise the Amparo is said to lack subject matter, *Carece do materia*, and may be dismissed.[19]

If the provisions of a general law are not self-executing, it is held that an abstract situation exists. The petition for Amparo is held to be premature, and Amparo processes will not avail. An unconstitutional law is presumed to be void and of no effect. An Amparo versus a general law is not permissible, since this would permit a declaration relative to its constitutionality, in an Amparo proceeding.[20]

Amparo is not against the law but is against certain acts, entities or persons who seek to act pursuant to the law. It is not addressed to substance as much as to procedure. The law itself is not considered attackable. It is the overt acts committed in pursuance of or under color of law that are singled out. This is in keeping with the concept that it is the individual who is involved, it is his specific facts which are set forth in his statement seeking Amparo.

AMPARO REMEDY SUMMARILY GRANTS DUE PROCESS TO INDIVIDUAL

In the State of California the Administrative Procedures Act sets down certain procedural steps which must be exhausted by an aggrieved citizen, in certain types of administrative proceedings, before he can get into a court of law to test rules and regulations or actions which allegedly have invalidly impinged upon his fundamental constitutional rights. This legislation does not, however, apply to all administrative bodies, and sometimes there is no administrative remedy of review.

Due process is required in Mexico in all administrative proceedings, by reason of the constitutional guarantees given to the individual, such as notice, the right to be heard, and the right to defend oneself within the administrative proceedings. Unless this grievance machinery exists in connection with all executive/administrative actions, individual guarantees of the Mexican Constitution are said to be violated, and Amparo becomes available to enjoin the proceedings until compliance with due process and hearing is first obtained.[21]

Since the remedy of Amparo arises from basic Constitutional rights, it is a grievance mechanism that may not be enjoined or set aside by any court or law. Once the petition has been filed, it must be summarily processed and disposed of by the Court until judgment is pronounced. Nor is it incumbent upon the petitioner to place the matter on the calendar. Since it is of primary public interest that individual guarantees be protected, it is the inescapable duty of the Court to give it preference on the calendar and have the matter set and heard forthwith. The proceedings are considered as "special" proceedings and are not ordinarily susceptible of delays.

The ability to get action fast and to preserve the status quo until that action is followed to its conclusion is one of the most appealing and interesting features of the Amparo process. There is little point in applying the cumbersome common law practice of pleading by precedents to the technicalities of administrative laws and regulations. Long, drawn-out court proceedings or extensive waiting periods because the court calendar is overcrowded are avoided. As stated, the

[18] Article 107, Constitution of the Republic of Mexico.
[19] *Ibid.*, Tomo XXIX, p. 1837.
[20] *Ibid.*, Tomo XXIII, p. 985.
[21] Article 14, Constitution of The Republic of Mexico.

doctrine of *stare decisis* does not come into play and action is prompt because the threatened imperiling of an individual's constitutional rights takes precedence over other court cases.

When Amparo is brought before the Federal District Judge, he does not concern himself with the merits in the controversy before the administrative body or the civil Court.[22] *His examination is limited to the guarantees of the Constitution and its possible violation as to the individual who has petitioned.*

Under the Rules of Amparo, the procedures which govern ordinary civil actions do not apply, nor do the rules of evidence concerning the presumption that official duty has been done, nor is it presumed that determinations of fact by administrative or legislative bodies who themselves are in control of the evidence and official files are true. *The purpose of Amparo is to force the government agency or instrumentality to disclose its records and its evidence with relation to the particular person whose individual rights are alleged to have been violated.*[23]

The petition (demanda) must be presented within 15 days from the date that the petitioner has received actual knowledge that his individual constitutional rights have been directly violated, coupled by some affirmative act which may carry or attempt to carry the violation against the aggrieved party into effect by the responsible authority—federal, state or local. If the Amparo proceedings are not presented in a timely manner, the right to raise the constitutional violation is not waived but it can only be raised in an ordinary civil action, not the special Amparo process.

In seeking the protection of one's individual guarantees or freedoms, the specific violation must be spelled out by the petitioner. The Federal District Court will not supply or write in deficiencies of substance nor guess what has been violated by the "responsible parties" (autoridades responsables). Nor may the Federal District Court volunteer defenses on behalf of the administrative or executive agencies which they themselves do not set forth in their respective answers. The Federal Court may not decide the case solely upon a precedent decided in another case and hold under the principle of *stare decises.* It is not compulsory to adjudicate the case at hand in accordance with prior rulings. The Federal Court, thus, does not become an advocate for either side, which could be dangerous by reason of its expertise. The purpose of the Amparo proceeding is to permit each case to stand or fall upon its own special and particular merits as to the law applied, regulations sought to be enforced, and as to the facts which may exist in the special individual proceedings.

The administrative agency must itself justify the action taken by it against the aggrieved party. The Amparo procedure requires that the accused authorities or the agency, administrative body, or other State or Federal instrumentality, file an answer, which is called its "informe con justificacion"; i.e., facts and records in its custody or control tending to justify its action as against the aggrieved party. If the authorities do not justify their action within a given number of days, or refuse to answer, it is presumed that there is no defense to the charge made by the aggrieved party and an immediate, automatic decision is rendered to secure redress of the plaintiff's grievance.

In the Amparo procedure, the aggrieved party ordinarily serves a bill of particulars on the responsible authorities alleged to have violated his individual guarantees, demanding of said authorities that they submit certified copies of the records itemized in the bill of particulars. Written interrogatories are likewise served and filed. These interrogatories permit the asking of leading questions and facts are permitted to be assumed so as to get a "yes" or "no" answer. This questioning is called "positions" in Spanish—"posiciones."

The use of an adaptation of the Amparo process interrogatories in the form of "posiciones" is also not without relevance to our own necessity for discovery before trial in seeking to redress citizen grievances. Judge Philbrick McCoy of the Superior Court of Los Angeles County recently addressed himself to this problem, saying:

"It may come as a shock to some lawyers that discovery before trial in civil actions is by no means new . . . and is not the invention of the devil. Millar tells us that discovery as we know it today had its origin in the Romano-canonical procedure which, beginning in the 1200s, employed so-called 'positions' consisting of affirmative propositions to be answered by the adversary under oath. By the

[22] Op. Cit., Tomo XVII, p. 1042
[23] *Ibid.*, Tomo 11, p. 498.

time of Blackstone, says Millard, the English Court of Chancery had developed the 'complicated, difficult and expensive' system of discovery of facts by a bill in that court which, with some minor adaptations, found lodgment in America . . ." [24]

In effect, the Amparo procedure permits a "prior or instant inquiry" by the Federal District Court into the question of the alleged unlawful abuse or use of power in violation of an individual's human rights. If it concerns lack of procedural due process, the entire proceedings of the administrative agency may be summarily vacated. Whether a dismissal takes place with or without prejudice depends upon whether a constitutional guarantee of the aggrieved petitioner has been violated and if he may summarily be placed in his former status by a remand from the Federal Court to the authority involved.

COMPARISON OF AMPARO AND ORDINARY PROCEEDINGS TO REDRESS ADMINISTRATIVELY-CAUSED GRIEVANCES

In the absence of constitutional provisions, the trend of thought in Mexican legislation, legal opinions and doctrine up to 1936 was that physical acts of the working administration (excluding formal official acts) could be challenged by the individual only by means of ordinary proceedings before the courts in cases where the law under which the act was committed provided for the institution of such proceedings, or by means of Amparo in cases where ordinary proceedings were not provided by the law. For a proper understanding of the part played by Amparo in administrative disputes, a clear distinction must be made between those two types of proceedings.

After lengthy controversy, it was finally agreed that the ordinary proceedings mentioned above might have a constitutional basis in article 97, section I (now 104 I), since the disputes in question concerned the execution and implementation of Federal laws, a matter in which competence lay with the Federal courts. An appeal against the decision of the District Judge in the lower court could be lodged with the Central Circuit Court; and the latter's final decision could also be challenged, this time by means of Amparo proceedings before the Supreme Court of Justice. Thus the ordinary proceedings before the courts at two levels constituted a typical action in connection with administrative disputes, where competence lay with the judicial authorities. Amparo, as applied against the final decision in the ordinary proceedings, retained in this case its role of protecting the legality prescribed for legal proceedings of any type by Article 14 of the Constitution, which was exactly the role it played in civil proceedings.

Even in the most flourishing period of ordinary legal proceedings the number of administrative cases adjudicated in that manner was not great. With the passage of time, such cases have almost disappeared from the legal scene, because their slow course through the legal process caused a long period of uncertainty concerning acts of the administration often practically making moot the subject-matter of the case.

In 1936 an idea was put into practice which had been under consideration and discussion for some time—namely, the establishment of the Federal Fiscal Tribunal as a delegated organ of justice in Federal "fiscal" matters, with jurisdiction in cases of administrative disputes. The validity of a formal official act committed by the "fiscal" authorities becomes the subject of proceedings in the form of a case before the Fiscal Tribunal against the authority responsible for the act; the decision of the Tribunal declares that the act complained of is either valid or null and void. Actions for annulment before the Fiscal Tribunal are substantially equivalent to ordinary actions before the Federal courts of justice, but there are two principal differences between the two types of action. First, the former come before an administrative tribunal and the latter before the judicial courts; in other words, administrative justice in Mexico, which had been a matter for jurisdictional bodies forming part of the judicial system, was now entrusted to jurisdictional bodies introduced into the administrative system. Secondly, the rules of procedure in the two types of action are also different, the procedure of the Fiscal Tribunal having been devised in the light of the special nature of disputes in "fiscal" matters, whereas the procedure in an ordinary case is the normal procedure of the Federal Code of Civil Proceedings, which governs actions of any kind.

The decision of the Fiscal Tribunal may be challenged in two ways, according to which party is the complainant. If the authorities are the aggrieved party,

[24] *Journal of the State Bar of California*, Vol. 41, #4, July-August, 1966.

there is no recourse to Amparo. Legal opinion in Mexico does not concede that a governmental authority, as such, possesses the "personal" rights to which Amparo applies. The authorities may, however, appeal for a reversal of the decision to the Second Chamber of the Supreme Court of Justice, which then assumes the functions of an appeal court in relation to the Fiscal Tribunal. Thus the appeal becomes the second stage of the proceedings in connection with an administrative dispute, and the Second Chamber of the Supreme Court discharges at that level the same functions, in matters of administrative dispute, as those which devolved on the Fiscal Tribunal at the lower level.

But, if the aggrieved party is the individual, he has a right of recourse to Amparo against the decision of the Fiscal Tribunal which, for the individual, is the final arbiter in the case. The Amparo procedure then resumes its function of pronouncing upon the action of the Fiscal Tribunal from the standpoint of guaranteeing the legality of the proceedings, against the background of individual rights, as provided for in Article 14 of the Constitution.

However, outside the area of administrative actions subject to ordinary proceedings (before the judicial authorities) or to annulment proceedings (before the Fiscal Tribunal), there remains a vast range of administrative activity proper which is not subject to any method for redressing administratively-caused disputes, whether judicial or delegated. Within this range, the working administration preserves its reserved jurisdiction intact.

Nevertheless, the guarantee contained in Article 16 of the Constitution allows the Federal judicial power to intervene even in this area of reserved jurisdiction, precisely and exclusively by means of the Amparo procedure. It must be emphasized that there is no question in this case of Amparo protecting the guarantee set forth in Article 14, which presupposes the existence of a process consisting of legal proceedings before the courts—since that presupposition applies in administrative matters only where ordinary proceedings are instituted before the judicial courts, or annulment proceedings before the administrative tribunal in "fiscal" matters. But, no such presupposition exists where the act of the working administration is a formal official one and the law provides no means of challenging it by litigation—in other words, of bringing it before the jurisdictional bodies.

In circumstances where the purpose of Amparo is to provide direct protection, against the administrative authorities, of the guarantee set forth in Article 16 of the Constitution, without the interposition of any juridical decision between the act of the administrative authorities and the intervention of the Amparo judge, the proceedings are a substitute for the normal proceedings in administrative disputes, for which the laws make no provision in administrative matters not covered by ordinary legal proceedings or by annulment proceedings. The function of serving as a substitute for, or replacing, other procedures in administrative matters should be noted as a further additional attribute of the Amparo procedure.

AMPARO AND DUE PROCESS OF LAW

Due process of law commenced in our ken with Chapter 39 of the Magna Carta of 1215: "No freeman shall be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any way molested; nor will we proceed against him, unless by the lawful judgment of his peers or by the law of the land." Four hundred years later, in the Petition of Right, the phrases "law of the land" and "due process of law" became interchangeable. The Petition of 1628 prayed that "freedom be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command without any charge."

So, for half a milennium or more the concept of due process had been part of the heritage of the framers of our Constitution, but primarily as a limitation on the executive and not the legislative branch of government. It was thought that if the King could be forced to act only in accordance with Parliament's laws, this would be sufficient protection for individual rights. It was not until about 100 years ago in 1855 before our Supreme Court advanced beyond traditional English concept of due process to hold that it operated not only against the executive but also on the other departments of Government. Said the Court, "The article [fifth amendment] is restraint on the legislative as well as on the executive nad judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." [25]

[25] Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (1855).

The history of the attempt by sovereigns to impose coercive unilateral will upon a free people has been a never-ending subject of discussion. The precepts of due process of law originally imposed by courts in the United States upon quasi-judicial agencies delegated with the authority to carry out the will of the sovereign are frequently obscured by the proliferation of governmental agencies and instrumentalities possessed of broad administrative functions.

Some safeguards have now been erected against arbitrary administrative action, by the concomitant development of administrative procedures and laws, and administrative remedies. The grievances caused to a certain extent by administrative decision-making which thwarts due process in the imposition of governmental will, are, however, still many. Whereas the jurisdictional limits of judicial authorities have been and are being continually refined, there has been no general concentrated effort, in the United States, to circumscribe the exercise of arbitrary authority on the administrative level.

Our general doctrine of exhaustion of administrative remedies before being permitted access to courts of law,[26] while good in many respects, has served to delay the inevitable application of due process of law in the constitutional sense. It oftentimes occasions hardship to the "little man" who can least afford the delay. Justice delayed to an aggrieved person of low income is not only justice denied but often catastrophic.

A more recent innovation by Government in seeking to escape due process of law in imposing its coercive will upon its individual citizens the passing of laws which characterize as "legislative acts" determinations previously made by administrative boards and agencies. Rules of evidence have been legislated into effect whereby through the use of fictions or presumptions, based on administrative agency findings, the conclusions or determinations of a legislative body are almost immune to attack by a person, even though his personal rights are directly injured and violated.

By way of illustration, the Health and Safety Code of the State of California, section 33368, which deals with the subject of Redevelopment Agencies, provides as follows:

"The decision of the legislative body shall be final and conclusive and it shall thereafter be conclusively presumed that the project area is a blighted area as defined by sections 33031 through 33034 and that all prior proceedings have been duly and regularly taken."

Section 33361(b) of the Health and Safety Code, which gives the individual citizen the right to appear before the city council to deny the existence of blight in the proposed project area where his property is located and to show irregularity of any of the prior proceedings, can derive little comfort from the prior section of the law. The individual citizen has the *affirmative burden of overcoming the unilateral determinations made by the Redevelopment Agency.* These determinations are, in practice usually adopted en toto by the city council, which in many urban areas unquestioningly adopts and approves the determination by the Agency as its own, after oftimes perfunctory public hearings. The individual citizen whose property right is affected has no procedural remedy to present evidence on the broad issue of "blight" by any right of subpoena, or access to a court of law, until after the conclusive presumptions have attached to the legislative action of the city council and an ordinance giving the right to condemn his property is a *fait accompli.* Action soon follows the ordinance.

The extent to which conclusiveness attaches in administrative determinations varies directly with questions of fact. The greatest conclusiveness attaches when administrators exercise essential governmental power affecting individual privileges rather than rights.[27]

If a remedy similar to a writ of Amparo were available to Californians, there would be a limitation on the legislative body to create fictions and presumptions relating to evidence which in legal effect practically silences the person whose individual guarantees may be involved.

PRESUMPTION OF COMPLIANCE WITH OFFICIAL DUTY AND AMPARO

Redevelopment Agencies in California are singled out only for illustration of inoperable citizen grievance procedures. There are similar situations regarding other administrative agencies.

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[26] National Labor Relations Board v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938).

[27] *Public Clearing House* v. *Coyne,* 194 U.S. 497 (1904).

A Redevelopment Agency in California has the power to exproporiate or condemn the real property of a private person, with the ultimate purpose of selling it to another private person who, it is intended, will rebuild on it in fulfillment of and concurrence with the Agency Plan.[28] The major premise upon which condemnation is permitted is that the area is "blighted" and it is in the public welfare that it be redeveloped. The Agency is proponent, judge, and jury. There is scant right of administrative or other appeal. Potential evictees and property owners in an area to be redeveloped cannot challenge the decision to "redevelop" a portion of the urban area.[29]

Under existing rules, there is no guarantee giving a citizen the right to seek a court injunction against the municipality or Redevelopment Agency, until his battle is half lost because of the fictions and conclusive presumptions relating to evidence used as a basis for the determinations made by the Agency or the city. The lack of objective appraisal is one of the major defects in most present methods of redressing citizen grievances. "In the best of circumstances, haphazard complaint handling by . . . public official gives slight assurance that a grievance will be fully investigated. In the main, complaints are merely passed along to the officials concerned. Their response may be factual in tone, but nobody outside the administration is likely to see the file materials and thus be able to judge for himself whether the story has been fully and fairly told." [30]

A Redevelopment Agency, which has a probable conflict of interest, as a proponent of a redevelopment plan, must make a case to get federal funds to condemn an individual's property rights. The Agency formulates its own rules of evidence at hearings under its exclusive control, wherein it gives such materiality or weight to a grievance or challenge to the assumption of "blight" as it may unilaterally determine.

An individual whose real property is to be condemned and/or expropriated, particularly when it is valuable land on a rising market, should not be without an available remedy, tantamount to due process, on the basic, fundamental issue of "blight" or other issues.

Under Amparo an aggrieved person would seek procedural fairness in accordance with the precepts of due process. He would have the immediate right of subpoena from a court of law to compel the production of evidence in the possession of the administrative body, city, State or Federal instrumentality. Under the present Health and Safety Code of the State of California, this right is reserved by statute to a Redevelopment Agency, which has immediate free access without subpoena or other motion to the services of a municipal Planning Commission, a City Engineer, and other departments of the municipal corporation, on the basic evaluation of "blight." The individual property owner does not have, under the cited code, free or ready access to the services and facilities above mentioned. Nor does he have the right of subpoena in a court of law to compel the attendance of witnesses or to compel the production or inspection of material evidence, which he as a private citizen may specifically need, as evidence against the conclusions and determinations which the Redevelopment Agency may make upon matters of fact peculiarly in its possession or in files of governmental agencies. Consequently, judicial notice of such evidence by a court of law cannot easily be taken.

The design, scope and magnitude of redevelopment as it may violate the individual citizen is probably beyond and in excess of his financial ability to cope. He must pay his own costs and attorney's fees to probe into the issues. Assuming he could later receive a fair market value for his property, these necessary costs are not included as part of any award he may ultimately receive. He could well spend more money in protecting his rights than his ultimate compensation in damages returns under an action in eminent domain.

Basically, as so well put with reference to another situation in administrative law, "A citizen should not have to run the gauntlet of a long common law

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[28] Redevelopment Agencies are created by resolution of a city council. The council or mayor then selects five persons who form the governing body of the Redevelopment Agency, in charge of a real-estate business made up of several city blocks. They need not be realtors, have prior business experience or possess qualification other than residence. Usually . . . Redevelopment Agencies are not departments of a city. They are not directly responsible to the voters.

[29] Gart V. Cole, 166 F. Supp. 2d 129 (S.D.N.Y., 1958), att'd. 263 F. 2d 244 (2d Cie., 1959), cert. den. 359 U.S. 978 (1959).

[30] Gellhorn, Walter, *When Americans Complain,* Harvard University Press, Cambridge, 1966, p. 140.

war of attrition merely in order to force the . . . Veteran's Administration to provide him with the service to which he ought to be entitled by law." [81]

Without an Amparo or similar procedure which in the course of due process allows an aggrieved party every opportunity to overcome bureaucratic decisions with presently undisclosed administrative evidence, Californians have no ultimate meaningful remedy.[82] Under Amparo, if, during the administrative proceedings his constitutional guarantees are procedurally violated, the individual does not have to wait until the end of the hearing or case before commencing an appeal. He has immediate access by petition of Amparo to the Federal court on the constitutional issue involved to interrupt, to interpose Amparo for decision and remand (interrumpir el termino para la interposicion del amparo).[83]

This interruption by the supplementary remedy of injunction under Amparo prior to "conclusive presumptions" attaching would be a significant forward step. When a person's individual constitutional rights or freedoms are being procedurally violated, the Amparo concept at once re-establishes the individual rights of the petitioner and allows the proceedings to continue as to him after the interruption which would make available to him all of the evidence in accordance with due process of law, i.e. a legal proceeding readily, promptly and cheaply available to defend freedoms and constitutional guarantees.

AMPARO AND CONSTITUTIONAL RIGHTS

The individual guarantee of a person's right of privacy from governmental invasion of coercion has recently been probed by the U.S. Senate Subcommittee on Constitutional Rights. There is evidence that the Federal government is seeking to dominate the private lives of its employees in violation of constitutional guarantees. The committee's five year investigation was summed up by its chairman, Senator Sam Ervin, who said: "Administrative tyranny is self-generating. Inevitably, each new program arms administrative agencies with more money, more authority, new rules and regulations extending over wider areas of citizen activities."

The applicability of the Amparo concept to the problem delved into by the Subcommittee is obvious. As stated in the Introduction, the purpose of this publication is to foster debate on its potential use. It would seem to be quite pertinent to the necessity for restraint on governmental coercion in the invasion of individual rights of citizens, by legal remedies through Federal courts.[84] Senator Ervin's committee is apparently searching for a remedy like the Amparo. If the idea was also extended to programs administered with the aid of federal funds or personnel at the state and local level, a major step forward in the improvement of citizen grievance redress mechanisms could be accomplished. In Mexico, if the President has by decree or legislative authority delegated to lower units of government, authority to execute acts and in the process of so doing individual rights are violated, the President, himself, is named in the Amparo petition as one of the responsible parties (autoridad responsable). Amparo may then issue, enjoining the executive acts of the President, as well as his delegated subordinates.

The remedy is intended to be available at the time the overt act by the Government takes place or is announced for implementation. It is not intended that the grievances caused by bureaucratic behavior be placed in the hands of an agency or commission for processing through archaic or slow administrative procedures. Amparo is immediately available in a court of law to enjoin, suspend and set aside acts by the sovereign or his agents, which invade or imperil the individual guarantees of citizens, without prejudice to the petitioner. It is quick, well-known, cheap, simple and widely available and thus provides a positive answer to a question recently raised by U.S. Representative Jack Edwards of Alabama who asked: "How many people does the bureaucracy run over each day because they don't know how to get help?" [85]

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[81] Wheeler, Harvey, *The Restoration of Politics,* "Administrative Law and Constitutionalism," Center for the Study of Democratic Institutions, Santa Barbara, California, February 1966, p. 13.

[82] "Meaningful" is defined as quick, orderly, simple, inexpensive, widely-known and widely available means for the redress of citizen grievances.

[83] *Ibid.* Tomo XXVI, p. 1718.

[84] As noted in the Introduction, it is believed that this is the first English language educational publication dealing solely with the Mexican Amparo.

[85] Stevenson, Charles, "Big Brother Is Here," *Readers Digest,* November 1966.

POLITICAL OFFICE EXCLUDED FROM AMPARO

As in the United States, political office in Mexico is not considered a civil right. Removals from office are governed by election laws and code. A public official, as such, in the exercise of his official acts in contradistinction to his private acts, does not have the remedy of Amparo to interject between orders given to him by superior officials and normal obligations to execute them.

AMPARO AND THE JUDICIARY

Mexican Amparo processes are not limited to federal, state and local executive or administrative agencies but are also available, vis-a-vis the judiciary. In the United States, if an aggrieved party can present a *prima facie* case showing that the ordinary remedy usually involving prolonged appeal time is not speedy enough to protect him in his personal or property rights, our "extraordinary writs" have been developed to the extent that abuse of authority by lower courts (whether because of arbitrary action or excess jurisdiction) may ordinarily be treated with by higher courts. The extraordinary writs are available to enjoin lower courts or quasi-judicial bodies from continued unlawful procedures. They are not, however, available when the agency or court is proceeding in a lawful manner, although the cumulative effect of such action on an individual of specific group of individuals may be to deny individual rights or privileges guaranteed by the constitution. Amparo, however, is, to redress what Justice Douglas has called "outrageous acts" committed in a perfectly lawful manner.

CONCLUSION

This exposition of one method complement existing procedures for the redress of citizen grievances in California's urban areas, would have served no useful purpose unless the Amparo concept could be interwoven into our system of law and government. It has already applicability, transferability and adaptability at least to California.

It would be least useful as a remedy against grievances within the judicial branch of Government, but most useful in a myriad of other administrative circumstances. Even within the judiciary it would have one important attribute now lacking in our judicial system. It could afford a supplemental remedy to dispose of procedural violation of constitutional rights during a trial, without the need of first trying a long case and afterwards taking up that point on appeal. A Federal district court could order a lesser court trial suspended insofar as the basic case is concerned, order up a hearing on the constitutional point, have a rapid hearing and remand the matter to the lesser court on the constitutional violation if it is found to violate an individual's guarantees. The temporary suspension of the trial until the alleged violation of individual constitutional guarantees is adjudicated has *not* proved onerous, unduly burdensome or cumbersome in Mexico. The lower court trial judge is not supplanted, nor does he lose jurisdiction over the main issue. Under the Amparo process, only the grievance alleging a denial of individual rights is heard.[86]

Under Mexican legal rules, failure to break out the alleged violation of individual privilege or right by asking for Amparo during a court trial is not held as a bar to later testing of the matter. The aggrieved party reserves his other constitutional rights to exception during the trial without asking for Amparo and if the decision be adverse, he may still appeal if he has specifically reserved his constitutional exception in the lower court (interponer apelacion o revision).

Additional federal judges might be needed to carry the extra load created by adoption of Amparo as a supplemental remedy for the redress of citizen grievances. (In Mexico, there are 21 Supreme Court Judges divided into departments relating to different specialities). "The requirements of equity point up the need to create an auxiliary judicial office." [87] Other countries have provided for the need by creating the Ombudsman, the Conseil d'Etat, the Procurator, the Inspector General and so on through numerous examples. Our own grand jury system finds some roots in this need. The examples are easy to find because the need has always arisen wherever administrative functions have become large and complicated.

[86] *Ibid.* Tomo XI, p. 326.
[87] Wheeler, op. cit., p. 14.

The benefits that would result from the creation of new judges in the court system to perform Amparo functions would tend to offset the ineffectiveness of the present varied procedural processes (or lack of them). Our constitution, of course, fixes neither the number of courts in the federal system, the number of judges on the Supreme Court or in the federal judiciary; these being prerogatives of Congress.[38] Amaparo would not do away with present grievance procedures and mechanisms, but would simply supplement them for more effectiveness by permitting the flexible interposition of a restraint against violation of individual guarantees.

The goal of equity is no different today than it was when Aristotle defined it to be the elimination of injustices that may arise from the very generality and universality that is the greater virtue of the law.[39] The difficulty is that our system of common law, by insistence on precedent and by other characteristics forecloses its utilization when applied to administrative regulations.

The complex of local agencies, commissions, governments and districts in California's urban areas and the conglomerate of State and Federal agencies and instrumentalities has made of urban affairs within these United States a crazy quilt of cross-currents and jurisdictional lines. Procedures for the redress of citizen grievances which must insure due process of law should be considered for lodgement in Federal Courts where they most properly belong in today's condition. The citizen needs an equiliberating counterweight to the administrative state which has brought with it a series of fundamental transformations that have not yet been accorded jurisprudential recognition. In fullfillment of the individual freedoms in the federal constitution, it is imperative that possible administratively-caused grievances be redressable in quick, inexpensive, available manner.

We need institutions which will provide an investigating and justice-dispensing function, receiving and uncovering citizens' complaints. The goal is to cease forcing citizen complaints into an adversary proceeding that pits little man against big government. The reason why citizens "can't fight city hall" is because of the one versus one concept, with one of the ones holding all the trumps. The citizen needs his own protector against administrative acts so that it is no longer the individual against the government agency but the collectivity functioning through its own protector: the public interest mobilized against possible bureaucratic despotism.

The basis for setting our course already exists and need only be supplemented by a bold approach. The Amparo process, predicated on the Mexican experience, ought to be considered, evaluated and possibly adapted. Its applicable features make it ideal to prosecute the individual's case as one involving the public interest. It could easily be incorporated into our processes for the redress of citizen grievances in urban areas.

We need to give formal constitutional recognition to our distinct system of administrative law, endowing it with appropriate controls and suitable redress procedures and then fitting it into the legal order. Amparo processes as a supplemental remedy could well temper the armor against administratively-caused citizen grievances Its distinctive assets are many, not the least of which are: (1) the maintenance of the *status quo ante*, (2) the unnecessity of considering each case as a possible precedent under the doctrine of *stare decisis*, (3) the absence of "presumptive conclusion" insofar as an agency's findings are concerned within concepts of due process of law, (4) the summary nature of the remedy and its assured early hearing by priority status on the court calendar, (5) its applicability to all agencies and levels of government, without exception.

As a final thought, there is room for contemplation of the Amparo process within the framework of the recent spate of Supreme Court decisions concerning individual rights and constitutional guarantees in criminal proceedings. The unduly heavy concentration of Spanish surname defendants in whose behalf the Court has in many ways imposed difficulties on the law enforcement profession may lead one to speculate on how beneficial for all concerned, the accused and society in general, Amparo processes would have been as a method to redress possible citizen grievances involving impingement of constitutional rights in criminal proceedings from apprehension through trial.

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[38] United States Constitution, Article I, Section 8(9), Article III, Section 1.
[39] See esp. *Nicomachean Ethics*, Book V 4(B), etc.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
SCHOOL OF LAW,
New York, N.Y., January 15, 1968.

Hon. EDWARD V. LONG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: I applaud your initiative in formulating and introducing S. 1195, establishing an Administrative Ombudsman to inquire into complaints concerning administrative action or non-action in the Social Security Administration, Veterans' Administration, Internal Revenue Service, and Bureau of Prisons. An analysis of Congressional mail, which I undertook two years ago, persuades me that a major share of the grievances communicated to Congressmen by their constituents do pertain to the functioning of those agencies. In my judgment an Ombudsman of the type you envisage could do much to effect improvements that would forestall many of these grievances in the future.

The bill itself is well conceived and aptly drafted, in my opinion. A few questions have, however, occurred to me as I read the proposal.

1. *Sec. 3(c)(3)*: I am dubious about the desirability of absoluetly disqualifying for the Ombudsman job everyone who has served in Congress or in one of the affected agencies within the preceding five years. I understand your desire to arouse public confidence that the appointee is not "biased" or "political" or simply a deserving "lame duck." But your exclusionary provision would disqualify some extremely able people. I believe that your purpose could be accomplished without quite so sweeping a disqualification.

2. *Sec. 3(d)*: I do not believe that the Ombudsman should be barred by law from actively participating in community affairs. I agree that the Ombudsman should not be a person who aspires to high elective office, but I would allow him (if he wanted) to be a candidate for a suburban school board or other local office. In sum, I would be inclined to leave a great deal to the Ombudsman's own sense of decorum; if he is good enough to be appointed in the first place, he is likely to have sufficiently sound judgment to avoid entanglements that would lower the esteem in which he is held.

3. *Sec. 3(g)*: Your bill authorizes the Ombudsman "to charge a nominal fee for the investigation of complaints." Only New Zealand, among present ombudsman-served nations, has a provision for fees; and so far as I can discover, nobody in New Zealand or elsewhere now thinks that a fee is desirable. I would leave out this provision, even though I recognize you propose merely to authorize rather than to command a filing fee.

4. *Sec. 4(c)*: An unqualified requirement that the Ombudsman state reasons whenever he decides not to investigate strikes me as unwise. Sometimes complaints are so captious or so extreme as to suggest the existence of psychiatric problems in the senders. I recall having seen in the Finnish Ombudsman's office a complaint to the effect that the President of Finland persistently followed the complainant wherever he went, day and night, much to the embarrassment of the complainant, who asked the Ombudsman to tell the President to stop. Should the Ombudsman be compelled by law to inform the complainant of his reasons for not investigating a complaint of that nature? Another aspect of section 4(c) also seems to me to be undesirable. I refer to the requirement that the Ombudsman, if he does decide to investigate a grievance, must give written notice of that fact to the complainant and to the agency involved. This inflexible requirement will make for unproductive paper work without any compensating advantage.

5. *Sec. 6(c) and sec. 7(b)*: These two sections direct the Ombudsman to submit materials to the Chairman of the Administrative Conference. I think it unwise to retain these directions because they may be regarded as intimating that the Ombudsman is somehow a subordinate or auxiliary of the Administrative Conference's chief officer. I agree that many of the Ombudsman's findings may be of interest to the Administrative Conference, just as they may perhaps be of interest to other governmental agencies. But I would trust the Ombudsman's judgment to identify those with whom he should communicate.

6. *Sec. 7(a)*: This section tells the Ombudsman to inform the Department of Justice whenever he determines that a public servant "has been guilty of a breach of duty or misconduct." The instruction is too narrow. Some but certainly not all neglectful or wrongful acts may have criminal connotations, and should therefore be brought to the notice of a law enforcement agency. Many acts that

have no element of criminality may nevertheless warrant disciplinary proceedings or some other personnel action. Hence I would simply instruct the Ombudsman to "refer the matter to the appropriate authorities," leaving to him the question of whether in a particular instance the "appropriate authorities" are the Department of Justice or someone else.

May I repeat, in closing, that S. 1195 impresses me most favorably. The suggestions I have made concern minor points that do not affect the core of your proposal.

Sincerely yours.

WALTER GELLHORN,
Betts Professor of Law.

NATIONAL FEDERATION OF THE BLIND,
Washington, D.C., January 29, 1968.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practices and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: At the time your committee resumes holding public hearings on S. 1195, your bill to establish the Office of Administrative Ombudsman to investigate administrative practices and procedures of selected agencies of the United States, the National Federation of the Blind requests the opportunity to appear and present testimony in support of this proposed legislation.

The National Federation of the Blind is a nationwide organization with a membership primarily of blind persons.

As you well know, Congress has created certain federal programs for the benefit and assistance of persons disabled by loss of sight.

Some of these programs are administered by federal agencies, while others are administered by state agencies with the participating financial support and under the over-all direction of federal agencies.

Such programs as the Social Security-based Disability Insurance, Aid to the Blind, Vocational Rehabilitation, the Vending Stand Program under the Randolph-Sheppard Act, and Books for the Blind and Physically Handicapped, have as their sole purpose, the providing of financial help or services to physically disabled men and women, to blind men and women.

Yet, too often, when blind people apply to such programs for aid and assistance, they encounter unjustifiable rejection, protracted delays, inadequate assistance, or services of poor quality.

We of the National Federation of the Blind believe that enactment of S. 1195 into law with the establishment of the Office of Administrative Ombudsman to serve as a high-level special pleader for ordinary citizens in their dealings with Government would be of immeasurable benefit.

To the National Federation of the Blind, to blind persons, it would mean there would be a known and recognized resource and authority to turn to when seemingly needless obstacles, and seemingly ceaseless delays, prevent them from obtaining the help and services they believe Congress intended for them when they created such programs.

We of the National Federation of the Blind believe an Administrative Ombudsman with the authority to investigate and adjudicate difficulties, would serve, too, as a Damoclean Sword, and should result, not only in the more expeditious solving of many problems not now solved or only solved now after long delays, but the mere existence of the Ombudsman should result in improved administration of federal programs.

Sincerely yours,

JOHN F. NAGLE,
Chief, Washington Office.

SAN FRANCISCO, CALIF., *March 14, 1967.*

Hon. EDWARD V. LONG,
Senate Office Building,
Washington, D.C.

MY DEAR SENATOR: I have read with much interest your press release stating that you have introduced legislation providing for the appointment of an Ombudsman of the United States. This is, as you point out, a step in the right direction. However, the Ombudsman should have jurisdiction to investigate the judiciary,

as in Sweden. I have been a judge of the Superior Court of California and have served twenty-five years in both the federal and state service and I can say that there should be such an office as Ombudsman in each jurisdiction and should extend to the judiciary. I am one who does not believe that lawers and judges are competent to discipline themselves. No man, high or low, wise or stupid, who is competent to discipline himself.

In light of the very sorry experience we have had with the lack of implementation of the Administrative Conference of the United States, because of the failure of the President to appoint a chairman thereof, after nearly three years, I wonder why you prescribe that the Ombudsman be appointed by the President. At the very least, he should be appointed with the advice and consent of the Senate. Article II of the Constitution of the United States, notwithstanding, I maintain that the Ombudsman could, lawfully, be appointed by the Congress without any reference to the President. The Congress has such inherent power to appoint an officer of this nature. Turning this thing over to the President would be like throwing it out the window. The Administrative Conference experience is illuminating.

With every good wish, I am,
Cordially yours,

EVERETT C. MCKEAGE.

SAN FRANCISCO, CALIF., *March 28, 1967.*

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, Senate of the United States, Senate Office Building, Washington, D.C.

MY DEAR SENATOR: I have your letter of March 20, 1967, wherein you request my consent to the inclusion of my letter of March 14, 1967, in the record of your subcommittee. I am happy to have you so include my letter.

After reading your bill—S. 1195—creating the office of Ombudsman, I want to congratulate you for doing a very thorough job. Some contend that the creation of such an office is a reflection upon the integrity of the existing agencies. Nothing could be further from the truth. No social compact should exist without there being a general inspector associated therewith. Even the military has a general inspector. All power corrupts but absolute power corrupts absolutely. No man is so wise and good that he may safely be trusted to discipline himself.

While I realize the difficulty of extending the jurisdiction of the Ombudsman to the judiciary, I must say that the federal judiciary, of all public officials, needs this type of discipline. The most arbitrary and arrogant of all judicial officers are to be found in the federal judiciary. While I would be the first to contend that the present Judicial Conference of the United States, constitutes a great improvement of what went before, still, I contend that judges should not be exclusively permitted to discipline themselves. Human nature shouts out against such heresy in government. In this regard, I am a disciple of the great Jefferson, who knew his federal judges. Every judiciary in this land should have an Ombudsman to watch over it.

Should you care to include this letter in your record, you are authorized to do so. What I have said comes from more than forty years at the bar, twenty-five years of which were spent in public service, both judicial and administrative and in both federal and state jurisdictions.

With all good wishes, I am,
Cordially yours,

EVERETT C. MCKEAGE.

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